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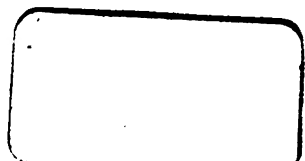
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WASHINGTON REPORTS

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CASES DETERMINED

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OF

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OF THE
SUPREME COURT OF WASHINGTON

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ERRATA

Page 541, line 7 from bottom, for 1897 read 1907

CASES
DETERMINED IN THE
SUPREME COURT
OF
WASHINGTON

[No. 7525. Decided June 30, 1909.]

JEROME BELKNAP, *Respondent*, v. PERRY E. PLATTER *et al.*,
Appellants.¹

WITNESSES—PRIVILEGE—HUSBAND AND WIFE—COMMUNITY DEBT. Bal. Code, § 5994, providing that a husband shall not testify against a wife without her consent, has no application to supplemental proceedings on a judgment for the community debt of the husband and wife.

EXECUTION—SUPPLEMENTAL PROCEEDINGS—ORDER. In supplemental proceedings, where money is disclosed applicable to the judgment, it is not prejudicial error that the order required its payment to the clerk of court rather than to the sheriff.

Appeal from a judgment of the superior court for Lincoln county, Warren, J., entered March 20, 1908, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in proceedings supplemental to execution. Affirmed.

Martin & Wilson, for appellants.

Neal, Sessions & Myers, for respondent.

Crow, J.—This action was originally commenced by James Belknap, against Perry E. Platter and Morva O. Platter, husband and wife, to foreclose a mortgage on land in Lincoln county. After foreclosure decree and sale, the plaintiff still

¹Reported in 103 Pac. 432.

held a deficiency judgment for \$1,161.35 against both of the defendants. Upon this judgment he caused an execution to issue to the sheriff of Lincoln county, which was returned *nulla bona*. Thereupon he instituted proceedings supplemental to execution, against both defendants, in which he obtained an order directing the defendant Perry E. Platter to pay to the clerk of the superior court a sufficient sum to satisfy the judgment. The defendants have appealed.

The appellants have presented numerous assignments of error, all of which we find to be devoid of merit, and none of which can be sustained. As a number of the questions discussed in their brief were not submitted to the trial court, we will consider only such as were presented there. The appellants were served in Chelan county with notice of the supplemental proceedings and citation to appear. They appeared specially and moved their discharge, for the reason that the Lincoln county court was without jurisdiction. In support of their motion they contended that they were residents of Chelan county, and that proceedings supplemental to execution could not be instituted or prosecuted against them in the superior court of Lincoln county. The evidence shows that they were residents of Lincoln county. The motion was properly denied.

When the cause came on for hearing upon the merits, the respondent called the appellant Perry E. Platter for examination, and was about to interrogate him as to property or money in his possession, which he unjustly refused to apply to the satisfaction of the judgment, when the appellant Morva O. Platter interposed an objection, contending that her husband could not be examined as a witness against her without her consent. The objection was overruled, and thereupon the appellant Perry E. Platter, in part, testified as follows:

“Q. What property have you, Mr. Platter, at the present time? A. That is, you mean in money or real estate? Q. Any property. A. I have no real estate. Q. What other

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property? A. I have some money. . . . Q. How much money have you? A. Well, I have about four thousand dollars. . . . Q. You had never intended to apply it on this judgment if you could avoid it? A. No, sir."

Other testimony given by him shows that the money mentioned was community property not exempt from execution. No other witness was called by either party, and the trial court thereupon entered an order requiring the appellant Perry E. Platter to pay to the clerk of the superior court of Lincoln county the entire amount due respondent upon his judgment.

Appellants' controlling assignment of error, and the one upon which they evidently rely for a reversal, is that the trial court erred in requiring the appellant Perry E. Platter to be examined as a witness against his wife and without her consent. In support thereof they cite Bal. Code, § 5994 (P. C. § 940), which reads as follows:

"The following persons shall not be examined as witnesses:

"(1) A husband shall not be examined for or against his wife without the consent of the wife, nor a wife for or against her husband without the consent of the husband; nor shall either, during marriage or afterwards, without the consent of the other, be examined as to any communication made by one to the other during marriage. But this exception shall not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other;"

Appellants also cite *Frankenthal v. Solomonson*, 20 Wash. 460, 55 Pac. 754, 72 Am. St. 116, 41 L. R. A. 311, relying upon certain expressions appearing in the opinion. The facts in that case are not parallel or similar to those involved in this action. There judgment for a separate debt had been entered against the husband, and supplemental proceedings were prosecuted against the wife who was being examined as a garnishee. Here a community personal judgment has been entered against both spouses, parties to the action. If, under the facts shown in the *Frankenthal* case, the statute was

not violated when the wife was required to testify without her husband's consent, we fail to understand how it was violated by requiring the appellant Perry E. Platter to testify in this cause. The community is a necessary party to this action, in which its creditor is seeking the collection of a community debt. Although as individual members of such community, the husband and wife were both made parties, the action was nevertheless against the community as such. The creditor is endeavoring to subject its property to the payment of his claim. He could not judicially establish such claim as a community obligation without proceeding against the husband and wife. He has thus obtained a community judgment, and if the wife is now entitled to object to an examination of her husband, in proceedings supplemental to the execution, instituted to subject the community property to the payment of such judgment, there is no good reason why the husband might not successfully object to her examination in the same proceedings. Neither party could then, upon such an examination, be required to disclose property fraudulently concealed by him or her. Such a construction of § 5994 would, whenever a community judgment happens to be involved, completely nullify the chapter of our code, Bal. Code, § 5312 *et seq.* (P. C. § 897), authorizing supplemental proceedings in aid of execution, which chapter expressly provides that a judgment debtor may be required to appear in court and answer concerning property which he unjustly refuses to apply towards the satisfaction of the judgment. When the rule as to the competency or incompetency of the husband and wife as witnesses was fixed by our statute, the legislature certainly did not intend any such result. Mr. Waples, in his work on Attachment, at § 950, says:

“Could she [the wife] shield herself from further examination after having denied liability in answering the statutory questions, she might thus interpose the sanctity of the marital relation to the defeat of the ends of justice. Her husband,

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being already adjudged the debtor of the plaintiff, should in good conscience permit the execution of the judgment against any property or credit of his not exempt from execution. His wife, by failing to disclose any such property in her possession or credit due him from her, would not be in the position of one refusing to testify in a cause pending against her husband, but in that of one impeding the execution of a judgment already obtained."

The same rule should be applied to the husband.

The supreme court of Wisconsin, in the matter of the *Petition of Mary J. O'Brien* for a writ of habeas corpus, 24 Wis. 547, well said:

"It is fully admitted that supplementary proceedings are a substitute for a creditor's bill under the old practice. And, as we understand the former practice, where the property of the judgment debtor, against whom an execution had been returned unsatisfied, was in the actual possession and control of the wife, under circumstances that rendered it impossible to reach and obtain possession of it by a creditor's bill against the husband alone, a bill *might be filed against the husband and wife jointly*, so as to obtain a decree which would reach the property in her hands, and compel her to deliver it up for the satisfaction of her husband's debts."

See, also, *Clairmont Bank v. Clarke*, 46 N. H. 194.

In *Frankenthal v. Solomonson*, *supra*, this court cited with approval the case of *Thompson v. Silvers*, 59 Iowa 670, 13 N. W. 854, in which the supreme court of Iowa said:

"We come then to consider whether the garnishee was exempt from answering because her answers, if they had disclosed an indebtedness to her husband, or property in her hands belonging to her husband, would have been testimony against him. It would not be contended, of course, if her answers had been unfavorable to the plaintiff [the judgment creditor], that they would have been testimony against her husband. The objection must be deemed to be predicated upon the theory that her answers might have been favorable to the plaintiff, and such as would have justified the court in charging her as garnishee. We have then to determine whether such a result would have been against the execution debtor's interest. To hold that it would, would be to hold

that it is his interest to be allowed to conceal his property and thereby evade the payment of his just debts. Now the law, we think, does not recognize that such is his interest. The debtor ought to use all his property which is not exempt, in the payment of his debts, and the law cannot recognize that to be his interest which is not right."

The answers made by the appellant Perry E. Platter upon his examination did not disclose any privileged communication between himself and his wife. He did not testify to any information or knowledge obtained by him from or through her. On the contrary, he only stated upon such examination that he had in his possession a large sum of money which he had obtained from the sale of certain wheat, made by him, and which money he had withdrawn from bank for the purpose of concealing it and thereby avoiding the payment of an honest debt. Justice and fair dealing require that community debts shall be paid with community property or funds not exempt from execution. It was to the interest of the appellant Morva O. Platter that this should be done. Appellants seek too broad a construction of the statute. Appellant Perry E. Platter was not examined as a witness against his wife's interest, in contemplation of the statute, which must if possible be so construed as to promote justice and fair dealing, instead of being made an instrument for the promotion of dishonesty, injustice, and fraud.

Some question has been raised as to the form in which the final order was entered. The appellant was ordered to make payment to the clerk instead of the sheriff. As the property disclosed was money, we fail to see that any prejudicial error was committed by ordering its payment to the clerk, or that the appellants have been thereby injured.

The judgment is affirmed.

RUDKIN, C. J., MOUNT, DUNBAR, and FULLERTON, JJ.,
concur.

CHADWICK, GOSE, MORRIS, and PARKER, JJ., took no part.

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Opinion Per CHADWICK, J.

[No. 7969. Department One. June 30, 1909.]

JOSEPHINE MEZA, *Respondent*, v. THE PFISTER COMPANY,
Appellant.¹

NEW TRIAL—DISCRETION—REMITTING EXCESSIVE VERDICT. It is discretionary for the trial court to refuse a new trial on condition of remitting part of an excessive verdict, where the correct recovery was capable of a mathematical calculation.

CONTRACTS—BREACH—EMPLOYMENT—MEASURE OF DAMAGES. In an action for the breach of a contract to employ the plaintiff, the measure of damages is the agreed salary, less sums earned by the plaintiff during the term, where the jury determined that the plaintiff was not incapacitated from performing.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered December 22, 1908, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

O. C. Moore, for appellant.

CHADWICK, J.—Plaintiff brought this action to recover the amount due on a contract for services rendered and engaged to be rendered as a singer, under a written contract. The term of the contract and plaintiff's physical ability to perform during a part of the time were submitted to the jury, among other questions, and resolved as questions of fact. A verdict which, under the instructions of the court, was, in effect, a holding that defendant had engaged plaintiff for a term of twelve weeks, and that plaintiff was at no time physically unable to perform her part of the contract, was returned by the jury. Upon this verdict a judgment for \$360 was entered. Upon motion for a new trial, this was reduced by the court to \$250, upon condition that it be accepted by plaintiff or that she suffer a new trial. She accepted this condition, and defendant has appealed.

¹Reported in 102 Pac. 871.

Appellant assigns as error the order of the court denying a new trial, and in permitting an election between a new trial and a reduction of the verdict, and in reducing the verdict. We think the court properly refused to grant a new trial. The case was fully and fairly tried, and no error is apparent, except the possible error of the jury in fixing a recovery that could not be sustained under the evidence by a mathematical calculation. This the court attempted to correct by his conditional order reducing the verdict. It is contended upon the authority of *State v. Dunlap*, 25 Wash. 292, 65 Pac. 544, and *Roberts v. Sabin*, 14 Wash. 35, 44 Pac. 108, that in a case where an exact calculation is possible and the jury fixes a larger amount, the court has no discretion to correct or amend the verdict conditioned upon acceptance or a new trial, but must grant a new trial. The power of the court in this regard is now generally admitted and, in the absence of a clear abuse of discretion, its ruling will not be disturbed on appeal. The rule is applied in actions on contract, or for torts to property the value of which may be ascertained or computed in dollars and cents. The authorities upon this subject are collected in 29 Cyc., pages 1020 and 1021.

The only question for our consideration, then is, Did the court make a just calculation of the amount proper to be entered as the judgment? As the case comes to us, respondent was entitled to recover for twelve weeks at \$40 per week, or \$480. From this should be deducted three weeks' salary, \$120; the amount earned after her discharge and during the life of the contract, \$75; in all \$195; leaving a balance due of \$295. It is complained that appellant is entitled to a further reduction in the sum of \$120 for the time it alleges respondent was physically incapacitated. This issue was resolved against it by the jury. It is further insisted that it is entitled to a reduction in the sum of \$29.35 and \$11.15, fare and expenses going to and returning from Montana. These amounts were improperly submitted to the jury over the objection of appellant. But by reducing the verdict from

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\$360 to \$250, we must presume that the court intended to, and did, take these items into consideration. If these items be now deducted from the amount which was actually due respondent, it would still leave \$254.60 due, or a sum in excess of the amount fixed by the court. It follows that no prejudice has resulted to appellant by the act of the court, and the judgment is affirmed.

RUDKIN, C. J., FULLERTON, GOSE, and MORRIS, JJ., concur.

[No. 7908. Decided July 1, 1909.]

SEATTLE LIGHTING COMPANY, *Respondent*, v. THE CITY OF SEATTLE *et al.*, *Appellants*.¹

GAS — FRANCHISES — EXTENT—"ANY ADDITIONS" TO A CITY. A franchise to lay gas pipes throughout the city and throughout any addition thereto, and as the boundaries thereof are or may hereafter be, embraces territory thereafter included in the city, and is not intended to be restricted to platted portions and other large areas not platted but within the then limits of the city.

SAME—MUNICIPAL CORPORATIONS—TERRITORY INCLUDED. Such a franchise is not void as granting rights outside the city limits.

Appeal from a judgment of the superior court for King county, Morris, J., entered February 5, 1909, in favor of the plaintiff, granting a writ of mandate to compel the issuance of a permit to lay gas mains in certain streets of a city, after overruling a demurrer to the affidavit. Affirmed.

Scott Calhoun and *Stephen V. Carey*, for appellants.

H. R. Clise and *C. K. Poe*, for respondent.

MOUNT, J.—Respondent brought this action in the lower court by mandamus, to compel the city of Seattle and its board of public works to issue a permit to respondent to lay gas mains in certain streets of said city. The appellants filed

¹Reported in 102 Pac. 767.

a general demurrer to the affidavit for the writ. This demurrer was overruled. The appellants stood on the demurrer. The lower court thereupon issued the writ as prayed for, and this appeal followed.

The question in the case is whether franchises heretofore granted, authorizing the respondent to lay and maintain gas mains in the city generally, authorize respondent to lay mains in streets now within the city but which streets were not within the city limits when the franchises were granted. It appears that in 1873 the city of Seattle, by an Ordinance No. 39, granted a franchise authorizing the predecessors of respondent to "lay down gas pipes and extend the service of gas throughout the city of Seattle and throughout any additions that may hereafter be made to the said city of Seattle." This ordinance was amended in the year 1881, in certain respects, but the authority in question was not materially changed. The amending ordinance recites the authority as follows: "To lay down gas pipes and extend the service of gas throughout the said city of Seattle and throughout any additions thereto." Subsequently, in the year 1901, the city, by Ordinance No. 6,968, granted a franchise to R. H. Malone and others, for a period of fifty years, to erect and maintain a gas factory in the corporate limits of the city of Seattle, "for the purpose of selling and supplying gas in the city of Seattle as the boundaries thereof are and may hereafter be." The respondent is the successor in interest of all these franchises.

It is shown by a map which is stipulated into the record that, in 1873, the city of Seattle contained ten and 42-100 square miles of territory, two and 19-100 square miles of which were then platted, the balance being unplatted land; that in the year 1901, when the last franchise was granted, the city contained forty-two and 28-100 square miles; and at the present time the city contains eighty-three and 45-100 square miles of territory. It is conceded that some of the streets where respondent seeks to lay gas pipes have been

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brought within the limits of the city since the last franchise was granted.

It is contended by the appellants that the respondent has no right to lay gas pipes in any territory not within the limits of the city at the time the franchises were granted. In other words, that the rights of the respondent company are confined to the city as it was when the respective franchises were granted. Appellants argue that the franchises are to be strictly construed, and that the city had no power to grant a franchise in territory without the city limits. These last two propositions may be conceded. It will be readily seen that the franchises above referred to were not confined to any particular streets or district within the city. The language is broad and clear. The grant is a general grant, "throughout the city of Seattle and throughout any addition thereto," and "as the boundaries thereof are or may hereafter be." It is clear from the language here used that the city intended to grant the right throughout the whole city, as it then was and as it might thereafter be extended. Counsel for the city argue that, because at that time there were large unplatted areas within the city limits, the phrase "any addition thereto" was intended to cover such unplatted areas within the city limits. If such had been the intention of the ordinance, it would no doubt have used words which would have expressed that idea. The words used clearly express the opposite idea. We think a reasonable construction of the language of the grant requires us to hold that the city intended the grant to be a general continuing one, expanding with the city, and not one limited to a particular district.

Appellants also contend that the city had no power to grant a franchise without its corporate limits. It did not do so in this case. The grant is confined to the city, and is effective within and not without the city limits. As soon as new territory is taken into the city, the grant immediately attaches without any further action on the part of the city. The authorities cited to these questions seem to be all one way.

In *Tuesdale v. Newport*, 28 Ky. 840, 90 S. W. 589, the supreme court of Kentucky said:

"If the ordinance had been silent as to territory hereafter taken into the city, the meaning would have been the same. The contract is to supply the city of Newport and its inhabitants with gas. The limits of the city year by year determine the limits of the contract. The city authorities have no power to contract for anything beyond the limits of the city, and any contract they may make can only bind property within the city, and when property is added to the city it necessarily falls within their jurisdiction."

In *St. Louis Gas Light Co. v. St. Louis*, 46 Mo. 121, the supreme court of that state, in discussing this point, said, at page 133:

"Counsel submit an elaborate argument to show that the contract could not have extended beyond the city limits as then existing; that, so far as it operated upon the extensions, it was *ultra vires* and void. Had the contract by its terms provided for lighting the streets beyond such limits, it would have been so far inoperative as an exercise of territorial jurisdiction beyond its range. But it contained no such provision. The additional orders for lamps were all to be within the city, and the city is a unit, though with changing boundaries. There might be a question as to extension of the exclusive rights of the plaintiff, for grants of monopolies are to be strictly construed; but there is no doubt that a city ordinance or a city contract, designed for the city at large, operates throughout its boundaries whatever their change."

And in *People ex rel. Woodhaven Gas L. Co. v. Deehan*, 153 N. Y. 528, 47 N. E. 787, the court said, in discussing this point:

"When the right to use the streets has been once granted in general terms to a corporation engaged in supplying gas for public and private use, so such grant necessarily contemplates that new streets would be opened and old ones extended from time to time, so the privilege may be exercised in the new streets as well as in the old. Such a grant is generally in perpetuity or during the existence of the corporation, or at least for a long period of time, and ought to be given effect according to its nature, purpose and duration."

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This language was quoted with approval in *Illinois Central R. Co. v. Chicago*, 176 U. S. 646, 20 Sup. Ct. 509, 44 L. Ed. 622.

See, also, *People ex rel. Chicago v. Chicago Telephone Co.*, 220 Ill. 238, 77 N. E. 245; *Des Moines Water Works Co. v. Des Moines*, 95 Iowa 348, 64 N. W. 269.

It seems clear that, when new territory is brought into a city, general ordinances of the city immediately control the new as well as the old territory, and do not require express legislative action to give them such application. *Town of Toledo v. Edens*, 59 Iowa 352, 13 N. W. 313; *Indiana R. Co. v. Hoffman*, 161 Ind. 593, 69 N. E. 399; *McGurn v. Board of Education*, 133 Ill. 122, 24 N. E. 529. An ordinance granting a franchise generally stands upon the same footing as any other ordinance of the city.

The appellants also contend that, inasmuch as Ordinance No. 6,968, granting the last franchise above mentioned, contained obligations to be performed by respondent, different from the former grant, the city had a right to know under which franchise the respondent intended to lay its mains. But we have seen above that the respondent had a right to lay its mains under all of the ordinances named. Whether the burdens have become merged or are still separate and can therefore be selected by the respondent, are questions which are not necessarily before us in this case.

For the reasons stated herein, the judgment of the lower court was right, and is therefore affirmed.

RUDKIN, C. J., FULLERTON, CHADWICK, GOSE, and CROW, JJ., concur.

[No. 7936. Department One. July 1, 1909.]

E. R. BUTTERWORTH & SONS, *Respondent*, v.

SARAH C. TEALE, *Appellant*.¹

PLEADING—VARIANCE—PREJUDICE. Under a complaint for the reasonable value of services rendered "at the instance and request of the defendant" it is not a fatal variance to prove that the services were rendered "with the knowledge and consent of the defendant," where there was no showing that the opposite party was actually misled as required by Bal. Code, § 4949.

HUSBAND AND WIFE — WIFE'S SEPARATE ESTATE — FUNERAL EXPENSES. The wife's separate estate is liable for the funeral expenses of her husband, he having left no property, where the services were rendered with her knowledge and consent.

Appeal from a judgment of the superior court for King county, Griffin, J., entered October 1, 1908, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

James Kiefer, for appellant.

John E. Ryan, for respondent.

MORRIS, J.—This action was brought to recover for services as undertaker in the burial of appellant's husband. The complaint avers the services to have been performed "at the instance and request of defendant," and that they "were of the reasonable and agreed value of \$561." The answer denied liability, and alleged the services to have been rendered at the request and upon the credit of a fraternal organization of which deceased was a member at the time of his death; which was denied. Upon these issues trial was had before the court without a jury, and the court found there was no express contract for the rendition of the services, but that they were rendered with the knowledge and consent of defendant, and were of the reasonable value of \$150, in which sum judgment was entered, and defendant appeals.

¹Reported in 102 Pac. 768.

July 1909] Concurring Opinion Per FULLERTON, J.

Appellant contends that error lies in that respondent sued upon an express contract and recovered upon a *quantum meruit*. The language of the complaint is, "at the instance and request of defendant," the finding justified by the proof is "with the knowledge and consent of defendant." There is no such fatal variance as would necessitate a finding of error.

"No variance between the allegation in a pleading and the proof shall be deemed material, unless it shall have actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits."

"Whenever it shall be alleged that a party has been so misled that fact shall be proved to the satisfaction of the court, and in what respect he has been misled, and thereupon the court may order the pleading to be amended upon such terms as shall be just."

Bal. Code, § 4949 (P. C. § 420).

If there was a variance between the pleading and proof, it availed appellant nothing, without a showing of resulting injury, in which case the powers of the lower court were ample to grant the proper relief. This section has been construed so often by this court that we do not now care to enlarge upon it. The following cases are decisive of the point, contrary to appellant's contention. *Olson v. Snake River Valley R. R. Co.*, 22 Wash. 139, 60 Pac. 156; *Wheeler v. Buck & Co.*, 23 Wash. 679, 63 Pac. 566; *Ernst v. Fox*, 26 Wash. 526, 67 Pac. 258.

Finding no error, the judgment is affirmed.

RUDKIN, C. J., and GOSE, J., concur.

FULLERTON, J. (concurring) — I concur in the conclusion reached on the question discussed and decided in the foregoing opinion, and, also, in the disposition made of the entire case. The appellant, however, in addition to the contention determined in the opinion, made the further contention that a wife is not, either at common law or in virtue of the statute, personally liable for the burial expenses of her husband, where she has not contracted to pay them and he

leaves her no estate. This question has seemed to me of sufficient interest and importance to be worthy of notice, and since it is presented by the record and thus necessarily decided, I shall briefly express my views upon it.

The cases with substantial uniformity agree that at common law a husband was personally liable for the funeral expenses of his wife, whether or not she left an estate of inheritance, or whether or not he had expressly contracted to pay them. *In re Weringer's Estate*, 100 Cal. 345, 34 Pac. 825; *Sears v. Giddey*, 41 Mich. 590, 2 N. W. 917, 32 Am. Rep. 168; *Brand's Ex'r. v. Brand*, 109 Ky. 721, 60 S. W. 704; *Kenyon v. Brightwell*, 120 Ga. 606, 48 S. E. 124; *Staples's Appeal*, 52 Conn. 425; *Smyley v. Reese*, 53 Ala. 89, 25 Am. Rep. 598; *Jenkins v. Tucker*, 1 H. Bl. 90. And this although the wife at the time of her death was living separate and apart from the husband. *Cunningham v. Reardon*, 98 Mass. 538, 96 Am. Dec. 670.

But while the courts agree substantially on the rule, they are not so unanimous as to the reasons for the rule, or as to the grounds upon which it rests. In the Georgia case cited, it was held that the duty of the husband to defray the funeral expenses of the wife grew out of the obligation of the husband to furnish the wife with the necessities of life, while in others it is based on the ground of duty arising from the relation of the parties. Subject to the laws passed in relation to the public health, the husband has the right of possession of the body of his deceased spouse between death and burial; he has the right to direct the place and manner of burial, and may change the place of sepulture at any time; he may recover in damages against any one who unlawfully mutilates the dead body, or otherwise wrongfully interferes with it; and neither the court in probate, nor the personal representative of the deceased, if such representative is other than the surviving husband, has any right to interfere with such possession. From these rights arise the corresponding duty of bearing the expenses of the interment.

July 1909] Concurring Opinion Per FULLETON, J.

Whether the common law imposed the duty upon the wife to bury the husband the authorities are not so clear. It is stated as the general rule in 12 Cyc. 1449, that the wife is not bound to use her separate property for the payment of the husband's funeral expenses. But one case is cited to support the text (*Robinson v. Foust*, 31 Ind. App. 384, 68 N. E. 182, 99 Am. St. 269), and that one seems not in point. The question before the court was whether a wife who supported her husband during his last illness out of her separate property on the promise of the husband's grandfather to make a provision for her in his will, could enforce the contract against the grandfather's estate. The court held the contract enforceable, but did not discuss the question here involved, and clearly it was not before them. Mr. Schouler, on the other hand, seems inclined to the opposite view; saying, however, that the obligation rested on a weaker foundation than the corresponding obligation of the husband. See Schouler's *Domestic Relations* (5th ed.), § 211.

In the case of *Chapple v. Cooper*, 13 M. & W. 252, cited by both of these authorities, the court took the view that the obligation of the husband and wife were alike in these respects, although the question before the court was whether an infant wife could bind herself by contract to answer for the funeral expenses of her deceased husband, the court deciding that she could. I am unable to find any common law case where the question was squarely decided. It would seem, however, that the question is determined by the selection of the ground on which the liability rests. If the funeral expenses are to be treated as necessities, then clearly the wife is not responsible, as her separate estate is not liable for her husband's or her families' necessities at the common law. But if the obligation rests on the ground of duty arising from the marriage relation, then it seems to me just as clear that the wife may be charged personally with the expenses of burial. This latter view is, to my mind, the correct one, as

the right of the wife to the body of her deceased husband is the same as the right of the husband to that of his wife. *Foley v. Phelps*, 1 App. Div. 551, 37 N.Y. Supp. 471; *O'Donnell v. Slack*, 123 Cal. 285, 55 Pac. 906, 43 L. R. A. 388; *Hackett v. Hackett*, 18 R. I. 155, 26 Atl. 42, 49 Am. St. 762, 19 L. R. A. 558; *Hadsell v. Hadsell*, 7 Ohio C. C. 196; *Larson v. Chase*, 47 Minn. 307, 50 N. W. 238, 28 Am. St. 370, 14 L. R. A. 85; *Durell v. Hayward*, 9 Gray (Mass.) 248, 69 Am. Dec. 294; *Chapple v. Cooper*, *supra*. See, also, *Pierce v. Proprietors Swan Point etc.*, 10 R. I. 227, 14 Am. St. 667; *Snyder v. Snyder*, 60 How. Pr. (N. Y.) 368; *Renihan v. Wright*, 125 Ind. 536, 25 N. E. 822, 21 Am. St. 249, 9 L. R. A. 514.

There is no direct provision of the statute making the wife liable for the funeral expenses of her deceased husband, nor is there much that indirectly supports such a rule, outside of the fact that the statute grants the wife greater property rights than she had under the common law, and imposes upon her a corresponding increase of liability. A woman now does not surrender her personal estate to her husband on entering into the marriage relation, nor does the husband have the profits from her separate real property. But her earnings during the relation are community property of which the husband has the management and control, and are as directly liable for the support of the family as are his own earnings. So also the expenses of the family and the education of the children are made by statute chargeable alike upon the separate estate of both spouses. Bal. Code, § 4508 (P. C. § 3874). Under this provision of the statute we have held the wife personally liable for medical and hospital services rendered the husband during his last illness, basing the decision on the ground that such services were for the benefit of the family, and the expense created thereby a family expense within the meaning of the statute. *Russell v. Graumann*, 40 Wash. 667, 82 Pac. 998. It may be that the expense of

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burying the husband could be recovered upon the same principle, but I prefer to rest my conclusion on the ground that it is a common law liability.

The judgment appealed from is therefore without error, and the order of affirmance proper.

CHADWICK, J., concurs with FULLERTON, J.

[No. 7774. Department One. July 3, 1909.]

T. J. DONALDSON *et al.*, Respondents, v. MAGGIE M.
WINNINGHAM *et al.*, Appellants.¹

DEPOSITIONS—NOTICE—GIVING NAME OF WITNESS. Under Bal. Code, § 6019, for the taking of the evidence of a "witness" by deposition, and requiring sufficient notice to enable a party to attend and "three days for preparation," the notice must state the name of the witness to be examined, that being within the spirit if not the letter of the law.

Appeal from a judgment of the superior court for King county, Frater, J., entered September 1, 1908, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action to quiet title. Reversed.

John H. Allen, for appellants.

H. E. Foster, for respondents.

Gose, J.—This case was here on a former appeal. See 48 Wash. 374, 93 Pac. 534. The suit was instituted by the respondents for the purpose of quieting title to certain real estate. Respondents claim title through the purchaser at a guardian's sale. The appellants were the former owners of the property, and in their cross-complaint have attacked the validity of the sale. This appeal is from a decree in favor

¹Reported in 102 Pac. 879.

of the respondents. Numerous errors are assigned, but as we view the case it will be necessary to consider only two of the points urged. They are, (1) error in admitting in evidence the deposition of F. C. Woodruff; (2) in admitting in evidence the deposition of Dr. E. Van Zant. We will consider these assignments together.

The deposition of the witness Woodruff was taken at Medical Lake, and that of the witness Van Zant at Vancouver, Washington. Each of these depositions was taken upon a notice which failed to state the name of the witness whose testimony it was desired to take. Each of the notices stated that the deposition of "sundry witnesses" would be taken at a time and place and before a person named in the respective notices. The applicable statute is Bal. Code, § 6019 (P. C. § 985), which provides:

"Either party may have the deposition of a witness taken in this state before any judge of the superior court, justice of the peace, clerk of the supreme or superior court, mayor of a city or notary public, by serving on the adverse party or his attorney previous notice of the time and place of examination. The notice shall be served such time before the time when the deposition is to be taken as to allow the adverse party sufficient time by the usual route of travel to attend, and *three days for preparation*, exclusive of the day of service, and the examination may, if so stated in the notice, be adjourned from day to day. The notice shall specify the action or proceeding, the name of the court or tribunal in which the deposition is to be used, and the time and place of taking the deposition. It shall be served upon the adverse party, his agent, or attorney of record, or be left at his usual place of abode."

The part of the section specifying what the notice shall contain must be read in connection with the other parts of the statute. The statute as an entirety clearly contemplates that the name of the witness shall be stated in the notice. It provides that the deposition of "a witness" may be taken upon the compliance with certain conditions. Bal. Code,

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§ 6017 (P. C. § 979), provides that "the testimony of a witness may be taken by deposition," and read in evidence in certain enumerated cases. The naming of the witness in the notice, if not within the letter, is within the spirit of the statute. One of the canons for the construction of statutes is that whatever is within the spirit of the statute is as truly within the statute as if it were expressed in words. Any other view might work great prejudice to the adverse party. If the name of the witness is given, the adverse party has an opportunity to investigate and determine whether he desires to attend the hearing and cross-examine. He cannot prepare for examination when the name of the witness is not given. The importance of the question is evident in this case. The points named in the respective notices were remote from the place of trial. It cannot be that the legislature intended to make it incumbent upon litigants to travel across the state to ascertain whether they wished to cross-examine the witness. There is ample authority to support this view. The statute of North Dakota (Revised Codes 1899, ch. 19, art. 7, § 5677), pertaining to the taking of depositions, is as follows:

"Prior to the taking of any deposition, unless the same is taken under a commission, a written notice entitled in the action or proceeding in which it is to be used and specifying the time and place of taking the same, shall be served upon the adverse party. The notice shall be served a sufficient time before the day specified therein to allow the adverse party time to attend by the usual route of travel and one day for preparation, exclusive of Sundays and the day of service. The examination may be adjourned from day to day."

In construing this statute, in *Ashe v. Beasley*, 6 N. D. 191, 69 N. W. 188, 190, the court said:

"We think that the letter and spirit of the statute require that the name of the witness whose deposition is desired should be inserted in the notice. Any other construction of the statute would, moreover, place the opposite party in a very embarrassing position, he being unable to ascertain,

down to the moment the witness was sworn before the notary, what witness he must prepare himself, or advise his assistant counsel to prepare himself, to meet. The party who desires to take depositions can always ascertain what witness it is necessary for him to examine. There is, therefore, no reason why he should not be required, in the interests of fair play, to disclose to his antagonist in advance the names of the witnesses who will be sworn at the specified time and place. Our statute contemplates that the adverse party shall have such notice as will enable him to reach the place designated, and prepare for the examination. Comp. Laws, § 5289. It is idle to expect him to prepare for the examination if he has no means of discovering what witnesses will be examined. And it is too clear to admit of countervailing argument that, if the doctrine is once enunciated that the name of the witness examined need not be stated in the notice, which contains at least one name, it will follow that the notice need not contain any name whatsoever. We believe our statute contemplates the giving of a notice which shall fully apprise the attorney for the opposite party as to the particular witnesses to be examined, to the end that he may determine whether it is necessary for him to be present at such examination, or to employ local counsel for that purpose, and to afford him opportunity for preparation to subject the witnesses to the test cross-examination."

In *Patterson v. Wabash etc. R. Co.*, 54 Mich. 91, 19 N. W. 761, 765, the court, speaking to the precise question, say:

"Although the statute does not in express words declare that the name of the witness proposed to be examined shall be given in the notice, yet it is clearly implied by its terms that the name of the witness shall be given in order to apprise the adverse party who it is he proposed to examine, as well as the time and place where he will be examined; and such has ever been the uniform practice in this state, whenever the depositions of witnesses are taken, unless by express stipulation waiving such requirement."

See, also, *Minot v. Bridgewater*, 15 Mass. 492; *Robertson's Admr's. v. Campbell*, 1 Tenn. 172; *Pape v. Wright*, 116 Ind. 502, 19 N. E. 459.

We think the view announced in these cases is a sound

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construction of the statute. The judgment will be reversed, with directions to the trial court to grant a new trial. The appellants will recover their costs.

RUDKIN, C. J., FULLERTON, CHADWICK, and MORRIS, JJ.,
concur.

[No. 8016. Department Two. July 3, 1909.]

GREAT NORTHERN RAILWAY COMPANY *et al.*, Appellants, v.
SNOHOMISH COUNTY *et al.*, Respondents.¹

TAXATION—ASSESSMENT—REVIEW—DISCRETION. In the absence of fraud, the courts cannot review the discretion of the tax commission in determining the amount at which different classes of railroad track shall be assessed.

SAME—TAX COMMISSION—POWERS—RAILROAD PROPERTY. A determination by the tax commission as to the amount to be assessed against railroad tracks being binding upon county assessors, it is immaterial that the commissioners viewed their powers as only advisory.

SAME. The law making it the duty of the tax commissioners to classify railroad property and superintend its assessment, instructions sent out to all assessors fixing the assessment on different classes of railroad track and rolling stock will be presumed to have been sent in conformity to the law, and are binding upon the county assessors; and a larger assessment by an assessor is void, notwithstanding he honestly endeavored to assess it at sixty per cent of its value, uniformly with other property in the county.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered January 11, 1909, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action to enjoin the collection of taxes assessed against railway property. Reversed.

L. C. Gilman, E. M. Carr, and F. V. Brown, for appellants.

Ralph C. Bell (Cooley & Horan, of counsel), for respondents.

¹Reported in 102 Pac. 881.

DUNBAR, J.—This action was brought by the plaintiffs for the purpose of enjoining the collection of a portion of the taxes assessed against the property of the plaintiffs in Snohomish county, Washington, for the year 1906, as to which portion the plaintiffs claimed that the assessment was illegal and void; and to require the defendant, the treasurer of Snohomish county, to receive and accept from plaintiffs, in full payment of their just and lawful taxes assessable in said county for said year, the sum of \$40,608.38, and to compel the cancellation upon the tax rolls of said county of all assessments and taxes against the plaintiffs for the year 1906. The complaint is a long one, to which the defendants demurred. The demurrer was sustained, appeal was prosecuted to this court, and the judgment of the lower court was reversed, the case being reported in 48 Wash. 478, 93 Pac. 924. Reference is made to that case for a detailed statement of the complaint.

For the purpose of making this opinion intelligible, however, it is necessary to say that the main contention set forth in the complaint was, that the taxes of railroad property had been classified by the board of tax commissioners, and the assessors instructed to assess the property in conformity with such classification; that the established rate of assessment of the right of way and track of the several classes of railroads was as follows: First class, \$2.75 per foot, or \$14,520 per mile; first class B, \$2 per foot, or \$10,560 per mile; second class, \$1.50 per foot, or \$7,920 per mile; third class, ninety cents, or \$4,752 per mile, etc.; that the assessors of the other counties in the state had followed the direction given by the tax commissioners in relation to valuation aforesaid, but that the assessor of Snohomish county has assessed railroad property in the county of Snohomish as follows: The main line first class road of the plaintiffs at \$25,900 per mile, and the rolling stock on the same at \$3,960 per mile; the first class B road of the plaintiffs at \$19,000 per mile, and rolling stock thereon at \$3,300 per

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mile. The rolling stock on 4.62 miles of said first class B road was assessed at \$1,320 per mile, and it was claimed, therefore, that plaintiffs' property had been assessed for taxation for the year 1906 at a valuation disproportionate to all other railroad property in the state, and at a valuation relatively greater than the other railroad property in the state had been assessed for said year, which amounted to \$26,000.08 in excess of the amount authorized by said state board of tax commissioners and by law.

In overruling the judgment of the court in sustaining the plaintiffs' demurrer, it was decided by this court, (1) that the main track and rolling stock of a railway extending through two or more counties in this state are an entirety for the purpose of assessment and taxation; (2) that the entire value of such main track and rolling stock must be apportioned between the several counties through which the road passes, in the proportion that the mileage in each of such counties bears to the entire mileage in the state; (3) that such main track and rolling stock must be assessed at their true and fair value in money; (4) that the assessment shall be equalized as between the different counties, so that equality of taxation shall be secured according to the provisions of the law; (5) that the state board of tax commissioners is given general supervision over assessors and county boards of equalization to that end. The court, quoting § 32 of the revenue act of 1897 (Laws 1897, p. 150), to the effect that:

"The value of the 'railroad track' shall be listed and taxed in the several counties in the proportion that the length of the main track in such county bears to the whole length of the road in the state, except the value of the side or second track, and all turnouts, and all station houses, depots, machine shops, or other buildings belonging to the road, which shall be taxed in the county in which the same are located;"

and § 34, which provides that:

"The rolling stock shall be listed and taxed in the several counties in the proportion that the length of the main track used or operated in such county bears to the whole length of

the road used or operated by such person, company or corporation, whether owned or leased by him or them in whole or in part."

It would seem that, in consideration of the sections quoted, no other decision could have been properly rendered in the case. The opinion also set forth § 2 of the act creating the state board of tax commissioners (Laws 1905, p. 224), which provides that:

"The commissioners shall have the power, and it shall be their duty: . . . Second: To exercise general supervision over assessors and county boards of equalization and the determination and assessment of the taxable property in the several counties, cities and towns of the state, . . ."

It was held by this court that the term "general supervision," as used in the statute, meant more than advisory power; that the law clothed the commission with power to determine, and to direct the assessors of the different counties to carry into effect the determinations of the board, in relation to the assessment of property; that the action of the assessor of Snohomish county worked an inequality in the assessment of the properties of the appellant companies as between the different counties of the state for 1906; that the state board of tax commissioners acted within its jurisdiction when it fixed the value of inter-county railroads for the purpose of taxation; that the acts of the Snohomish county officials were in disregard of the lawful orders and directions of their superior officers, and that they were therefore void and of no effect. This decision affected only the question raised, that the complaint did not state a cause of action, while this case involves the question of whether the material allegations of the complaint were proven.

The court made a finding, that the tax commission did not assess, or attempt to assess, the value of the railroad property in Snohomish county; that it gave the assessor no instructions as a board as to what value he should place upon it; that the only positive instruction was that the property

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should be assessed at sixty per cent of its value; and it was found that the assessor honestly attempted to do that. So that the case before us now is narrowed, under the former ruling of this court, which is the law of this case, to the question of whether the commission did direct the assessors to assess the railroad property in controversy at the rate of assessment quoted above.

It is urged by the respondents that it appears from the testimony in this case that, if the assessor had followed the suggestions of the commissioners and assessed the railroad property at the figures suggested by them, the property would not have been assessed at sixty per cent of its value; that the rest of the property in the county being assessed at sixty per cent of its value, there would not have been uniformity of taxation, and that, consequently, another provision of the fundamental law would have been abrogated. But, if discretion in this matter is vested by law in the board of tax commissioners, it must be assumed, in the absence of a showing of collusion or fraud, that the discretion has been properly exercised, and the question is, therefore, not open to determination by the court. That the tax commission is the legally qualified tribunal to determine this question was decided by this court in the former trial. Then the only question left is, Did the commission determine the question and in effect instruct the assessors of the different counties to carry out such determination?

Notwithstanding the testimony of the individual members of the board that they understood their action and communications to be advisory only, they evidently believing that, under the law, they did not have the power of direction, we think the court erred in the finding above mentioned; for it is not material whether the commission considered its instructions advisory or mandatory, or what view the members of the commission took of the law in this regard, because the construction of the law is a question ultimately to be determined by the courts. The pertinent and practical

question is what it did, and it is for the court to determine whether the advice or instruction—whatever term may be applied to it—was binding upon the assessors. The power of the commission and the duty of the assessors have been definitely determined by this court in the preceding case. We decided that it was a duty imposed by law upon the commission to give instructions and directions regarding the assessment of railroad property; so that the important question is, Were such instructions given? regardless of the views of the commissioners concerning their power to enforce such orders.

It seems conclusive to us from the instructions issued, that the commission had determined upon a scheme for the assessment of railroad property, and had classified such property to the end that uniformity of taxation should be insured; and that the assessors were notified of such a scheme and classification, and instructed to bring it into execution. It is obvious from the proceedings of the assessors' convention held in Olympia, January 16, 17, and 18, 1906, that the holding of this convention was conceived for the purpose of arriving at some harmonious course of action for the carrying out of the provisions of the law in relation to the assessment of property. Upon the invitation of the tax commission, the convention convened at the city of Olympia. The members of the state board of tax commissioners were made honorary members of the convention, and the report indicates plainly that to a marked degree they dominated the convention. A resolution was adopted at that convention establishing the rate of assessment of the right of way and the track of the several railroads in the state, according to the classification which we have set forth above. This resolution was unanimously adopted, and it was adopted we think, without doubt, in response to the suggestion of the members of the tax commission, although they were not acting as a board at that time. As indicating that the assessors understood that this was a direction from the board of tax com-

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missioners, and that they were anxious to follow such directions, the following resolution was reported to the convention:

"We, your committee on valuations, have given the matter as much consideration as possible in the limited time allowed, and we recommend the adoption of the following: That we will for the 1906 assessment of both real and personal property give especial and renewed efforts to comply with the statutes as we have been advised and directed by the state board of tax commissioners."

This report of the committee was adopted; but the commissioners did not stop with the adoption of these resolutions and acknowledgment of the assessors assembled that they would obey the instructions of the commissioners, but at different times other instructions were issued, and the commission issued and mailed to each assessor in the state certain printed instructions regarding the classification and valuation of railroad property. This pamphlet was headed: "Instructions to County Assessors," and, throwing some light on what was understood to be the effect of the reports adopted by the assessors in the convention held at Olympia, the instructions commenced as follows:

"The tax commission had hoped that the stenographic report of the convention of assessors held in Olympia on January 16 and days following would be complete and cover enough ground so that it could be printed as a complete report and obviate the necessity of any extended instructions to the various assessors, but when it was received from the stenographer we found that he had misunderstood his instructions as to what would be required and had left out so much that the assessors could get no clear understanding of the views of this board on many of the subjects brought before the recent convention. We have, therefore, concluded for the purpose of making ourselves thoroughly understood to send out as instructions what in our judgment each assessor or deputy assessor will need to accomplish a just and thorough understanding of his duties, to the end that a uniform assessment may be made throughout the state."

The instructions set forth, as one of the matters which it was desired to have specially understood, the report of the committee above referred to concerning the valuation of railroads, viz., First class, \$14,520 per mile, etc. In pursuance of the statement made by the commission, that in a short time the classification of railroads in each county would be sent out, on May 11, 1906, the tax commission prepared and mailed to each assessor of the state a letter, the body of which is as follows:

"Please find below classification of railroads traversing your county. This classification was made at the request of the assessors' convention, and is to be adapted to the schedule at the said convention agreed upon. You will note as to the rolling stock that first class rolling stock in said schedule is to be assessed at sixty cents per foot, first class B at fifty cents per foot, and second class at forty cents per foot. All rolling stock on classes of road below second class is to be assessed at such value as in the judgment of the assessor is right, and the assessor is to also assess all side tracks, spurs, etc., according to his best judgment."

This direction by the board, it will be seen, is in conformity with the express provisions of the law in relation to the assessment of side tracks, spurs, etc. The law imposes upon the tax commission the duty of giving instructions and directions regarding the assessment of railroad property, and it must be presumed, in the absence of proof to the contrary, that the instructions were set out in conformity with the provisions of the law and the powers conferred upon the commission. It appears from the testimony that all the assessors in the state received copies of these instructions, and that all the assessors in the state, with the exception of the assessor in Snohomish county, obeyed such instructions, and assessed the property of the appellants in accordance with the classification provided by the board of tax commissioners. This court, then, having decided upon the former trial of the cause that the tax commission had power to classify railroad property, and that it is its duty to so class-

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ify and superintend its assessment, and it having directed the different assessors of the state as to their duties in the premises, there is no escaping the conclusion that the commission acted under the provisions of the law, and it was the duty of the assessor to obey such instructions.

The judgment will be reversed, with instructions to grant the injunction prayed for.

RUDKIN, C. J., PARKER, MOUNT, and CROW, JJ., concur.

[No. 7876. Department Two. July 6, 1909.]

THE STATE OF WASHINGTON, *Respondent*, v. AUBREY T.
DODSON, *Appellant*.¹

PHYSICIANS AND SURGEONS — OFFENSES — PRACTICING WITHOUT A LICENSE. A law making it a criminal offense to practice medicine without a license is valid.

SAME—PROSECUTION—PROOF OF LICENSES—PRIMA FACIE CASE. Upon a prosecution for practicing medicine without a license, the statutory *prima facie* case is made against the defendant by proof that no license is on file with the county clerk, without proving that the defendant was not a practicing physician before the law went into effect.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered February 25, 1908, upon a trial and conviction of the offense of practicing medicine without a license. Affirmed.

A. G. Gray, for appellant.

Richard M. Barnhart, Donald F. Kizer, and William C. Donovan, for respondent.

DUNBAR, J.—This is an appeal from a judgment on the verdict of the jury finding the appellant guilty of practicing medicine without a license. The appellant assigns three er-

¹Reported in 102 Pac. 872.

rors: (1) Error of law growing out of the trial and excepted to by defendant; (2) that the verdict of the jury is contrary to law and the evidence; (3) error of the court in instructing the jury that an evidence of guilt should arise against the defendant for the reason that defendant failed to testify as a witness on his own behalf.

It is a little difficult to determine what error is referred to in the first assignment, for counsel for appellant, after stating that the errors will be taken up in their order and that the first error will be discussed, proceeds to the discussion of the contention that the verdict of the jury is contrary to law and the evidence. If, however, it is the intention of counsel to discuss the action of the court in overruling the demurrer to the complaint, which is not assigned as error, it is sufficient to say that the law under which this information was drawn and judgment rendered was sustained by this court in *State v. Carey*, 4 Wash. 424, 30 Pac. 729, and in other cases since that time. As to the assignment that the verdict of the jury is contrary to the law and the evidence, we think unquestionably there was sufficient legal testimony to be submitted to the judgment of the jury.

Appellant contends that, under the provisions of the statute, the state did not make out a *prima facie* case against him, because it did not show that he had not been a practicing physician prior to the enactment of the statute under which he was convicted. The state did show by the clerk that the appellant had not filed a license in his office, and that none had been filed. The statute makes the records of the clerk's office *prima facie* evidence of the existence or nonexistence of a license, and the force of this statute was definitely determined by this court in *State v. Lawson*, 40 Wash. 455, 82 Pac. 750, where the court, speaking on that subject, says:

"The appellant concedes this, but says the statute declares an arbitrary and illogical rule of evidence and is therefore unconstitutional. Where a license issued in any county of a state authorizes the prosecution of a business or the practice

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of a profession in any part of the state, the difficulty of proving that a given person has no license is very great. This fact has induced many of the states to enact laws imposing on the defendant the burden of proving a license in all prosecutions such as this, and these statutes have been declared constitutional. . . . If the state can require the defendant to justify under his license in the absence of any proof whatever, it goes without saying that it can likewise declare what character of proof shall constitute *prima facie* evidence."

Section 6289 of Pierce's Code (Bal. Code, § 3019), provides:

"Any person shall be deemed as practicing within the meaning of this act who shall have and maintain an office or place of business with his or her name and the words physician or surgeon, "Doctor," "M. D.," or "M. B." in public view, or shall assume or advertise the title of doctor or any title which shall show or shall tend to show that the person assuming or advertising the same is a lawful practitioner of any of the branches of medicine or surgery in such a manner as to convey the impression that he or she is a practitioner of medicine or surgery under the laws of this state;"

Evidence to prove that the appellant had done the things prescribed by the statute was offered, and it was for the jury to determine the weight of such evidence.

We do not understand the third assignment of error, viz., that the court instructed the jury that an evidence of guilt should arise against the defendant for the reason that he failed to testify as a witness on his own behalf, for an examination of the record shows, not only that no such instruction was given by the court, but that exactly the reverse instruction was given, the instruction given in that respect being as follows:

"The fact that the defendant failed to take the stand in his own defense is not to be considered by you, gentlemen, in this case. Our statute provides that the court must instruct the jury that the failure of the defendant to take the stand

in his own defense creates no inference of guilt. It is his privilege for him to take the stand if he so desires, but he need not if he does not choose to, and if he did not do so at the time and place take the stand the jury must not draw any inference of guilt on that account. In other words, you are not to take that fact into consideration in arriving at your verdict in this case."

The other contentions in relation to the sufficiency of the testimony are without merit. The judgment will be affirmed.

RUDKIN, C. J., MOUNT, PARKER, and CROW, JJ., concur.

[No. 7877. Department Two. July 6, 1909.]

WALTER R. HINCKLEY *et al.*, *Respondents*, v. J. T. CASEY
et al., *Appellants*.¹

APPEAL—SUPERSEDEAS BOND—CONDITIONS—ACTION FOR RENTS—LANDLORD AND TENANT. Under Bal. Code, § 5546, authorizing a stay of proceedings on appeal in forcible entry and detainer by a supersedeas bond conditioned "to pay all rents and other damages justly accruing," a supersedeas bond reciting that it is to secure such a stay and conditioned to pay all "damages and rents which the superior or supreme court shall adjudge reasonable for the possession of the property," entitles the obligee, on affirmance of the appeal, to recover, in an action on the bond, reasonable rents during the pendency of the appeal, without alleging that the court had adjudged anything therefor; since under Bal. Code, § 6523, the rent could not be ascertained without an issue and trial (RUDKIN, C. J., dissenting).

Appeal from a judgment of the superior court for King county, Gilliam, J., entered March 7, 1908, upon the verdict of a jury rendered in favor of the plaintiffs, in an action to recover upon an appeal bond. Affirmed.

John T. Casey (*Heber McHugh*, of counsel), for appellants, contended, *inter alia*, that an action would not lie on this bond until the court had adjudged the sum payable in

¹Reported in 102 Pac. 1051.

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conformity to the conditions of the bond. 5 Cyc. 813, 814. *Thompson v. State*, 4 Gill. (Md.) 163; *Davis v. Gully*, 19 N. C. 360; *Rives v. Baptiste*, 25 Ala. 382; *Cowles v. Garrett's Adm'rs*, 30 Ala. 341; *Gouverneur v. Tillotson*, 3 Edw. Ch. 348; *Heagney v. Hopkins*, 22 Misc. Rep. 549, 49 N. Y. Supp. 1018; *Rockefeller v. Donnelly*, 8 Cowen (N. Y.) 623; *Jones v. United States*, 96 U. S. 24, 24 L. Ed. 644; Addison, *Contracts* (6th ed.), 925; *People v. Stuart*, 97 Ill. 123; *Noble v. Bowman*, 35 Kan. 15, 10 Pac. 143; *Weed Sewing Machine Co. v. Philbrick*, 70 Mo. 646; *Storseth v. Folsom*, 45 Wash. 374, 88 Pac. 632.

Fred H. Peterson and Philip D. Macbride, for respondents.

PARKER, J.—The principal question in this case arises upon the demurrer to plaintiffs' complaint, which was by the court overruled. The allegations of the complaint, omitting formal parts, are as follows:

"That on or about June 1, 1906, said T. D. Hinckley, deceased, and wife, commenced an action in the above entitled court against said J. T. Casey and T. J. Casey to recover possession of certain office rooms, to wit: rooms 412 and 413 in the Hinckley block, in the City of Seattle, and that a trial was had in said action, and a verdict rendered by a jury on October 31, 1906. That thereafter judgment was duly entered on November 17, 1906, upon said verdict and that said defendants J. T. Casey, T. J. Casey, appealed from said judgment, and as a stay bond pending said appeal said J. T. Casey and T. J. Casey, as principals and P. H. Casey and A. P. Casey as sureties executed a bond conditioned among other things that they would pay all costs, damages and rents which said Supreme Court or said Superior Court should adjudge reasonable for the possession of said rooms during the determination of said appeal. That a copy of said bond is hereto attached and made a part hereof, marked exhibit A.

"That pending said appeal said defendants J. T. Casey and T. J. Casey continued in the actual possession of said rooms until March 15, 1907. That the actual rental value of

said rooms from October 31, 1906 to March 15, 1907, was at the rate of \$50 per month, being in all the sum of \$275.

"That demand was made upon said defendants to pay the aforesaid sum, but that payment has been refused.

"Wherefore plaintiffs demand judgment against said defendants and each of them in the sum of \$275, and for costs and disbursements herein, and that said judgment so recovered be doubled in accordance with the statute in such cases made and provided; and for such other and further order as may be proper herein."

The bond, which is attached to the complaint as exhibit "A," contains the following recitals and conditions, among others:

"The condition of this obligation is such that whereas, . . . and the defendants desire a stay of execution on said judgment and each and every part thereof so that they may retain possession of said rooms.

"Now therefore if the said principals J. T. Casey and T. J. Casey shall pay . . . and shall pay all costs, damages and rents which said Supreme Court or said Superior Court shall adjudge reasonable for the possession of said rooms during the determination of said appeal, then this obligation to be void; otherwise to remain in full force and effect."

It is contended by appellants that this complaint does not state a cause of action, in that it does not allege there was any order or adjudication of the supreme or superior courts fixing the reasonable amount of the rent appellants should pay pending the appeal, and that until such reasonable amount is so fixed, the failure to pay such rent is not a breach of the conditions of the bond. If this bond had been given independent of the appeal statute, and had not been intended as a supersedeas bond to stay execution and secure rent pending the appeal, there might be some merit in counsel's contention. It is true that the language of the conditions in the bond is somewhat different from the conditions of the stay bond provided by the statute, which reads:

"That, if the defendant appealing desires a stay of proceedings pending such appeal, he shall execute and file a

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bond, . . . conditioned to abide the order of the court on such appeal, and to pay all rents and other damages justly accruing to the plaintiff during the pendency of the appeal." Pierce's Code, § 1189 (Bal. Code, § 5546).

But when the recital in the body of the bond, showing plainly the intent and purposes for which it was given, is read in connection with the language of its condition, we think it becomes plain that both the principal and sureties intended to, and did thereby, assume the same liability, enforceable against them in the same manner, as if the conditions had been stated therein in the exact language of the statute. Appellants' counsel seem to assume that no rent would be collectible upon the bond unless determined by the court upon the appeal, and none having been so determined upon the appeal, it is contended that therefore none is collectible. But by reference to § 1071 of Pierce's Code (Bal. Code § 6523), relating to judgments upon appeal and supersedeas bonds, it will be readily seen that this rent is not such amount as can be ascertained by the court without an issue and trial. It is in no sense a part of the judgment appealed from, but is a separate and independent debt, the amount of which could not be determined from the record before the court. Indeed, we are unable to see how the question of the amount of the rent pending appeal could be submitted to the court in any other manner than by an ordinary civil action. *Northwestern etc. Bank v. Griffiths*, 18 Wash. 69, 50 Pac. 591; *Carmack v. Drum*, 28 Wash. 472, 68 Pac. 894. So it seems to us that plaintiffs complaint is sufficient as against this contention, and that they had the right to maintain this action to enforce their rights under this bond the same as if its conditions had been in the exact words of the statute.

We are of the opinion that other claims of error arising upon the trial are without merit and are not such as to require our discussion.

The judgment of the superior court is affirmed.

DUNBAR, MOUNT, and CROW, JJ., concur.

RUDKIN, C. J. (dissenting)—I dissent. The obligation of the sureties was fixed by their contract and not by the statute. If the supersedeas bond did not conform to the statute the respondents should have moved against it in the former action, rather than ask the court to change its provisions in this action.

[No. 7992. Department Two. July 6, 1909.]

FRANK ENYART, *Respondent*, v. INMAN-POULSEN LOGGING COMPANY, *Appellant*.¹

MASTER AND SERVANT—CONTRACT OF EMPLOYMENT—BREACH—DAMAGES. Upon breach of a contract to employ plaintiff for the term of one year, and to furnish material to build a house and house rent free during the employment, the measure of plaintiff's damages includes expenditures in building the house, although he was still living in it with rent free; as the house was not built independently of the contract, and he was not living in it under the contract after repudiation of the contract by the employer.

Appeal from a judgment of the superior court for Cowlitz county, McCredie, J., entered July 2, 1908, upon the verdict of jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

Thos. N. Strong, for appellant.

B. L. Hubbell, for respondent.

PARKER, J.—In November, 1907, an agreement was entered into between the parties to this action, by which the plaintiff and respondent was to peel poles and piling for the defendant and appellant. It was agreed that appellant should furnish one hundred thousand or more lineal feet of poles or piling, and pay respondent at the rate of one cent per lineal foot for such work during the whole of the year 1908. It was

¹Reported in 102 Pac. 1050.

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also agreed that appellant should furnish material to respondent to construct a house in which to live free of rent so long as the work continued. Other matters contained in the agreement need not be noticed, since the single question on this appeal arises upon the alleged error of the superior court in its instructions to the jury upon the respondent's claim for labor and expense in building the house preparatory for the work, as one of his items of damage arising from appellant's failure to carry out the contract. In January, 1908, the house being built, work was commenced, and about the last of January appellant refused to proceed further under the contract, and about two months later this action was commenced by respondent to recover damages from appellant for failure to comply with its terms, claiming, among other items of damage, the value of the work and expense incurred by him in the building of the house. A trial was had on June 27, 1908, resulting in a verdict and judgment favorable to the respondent.

The following instruction was given to the jury by the court, touching the building of the house by respondent and his right to recover therefor:

"Now, the item there of his expenditures in the performance of his contract referred to, the building of the house and the building of the float. . . . If the agreement was he was to build the house or furnish the labor for the house or whatever he was to furnish and he did it and was to get rent free and is getting free rent, then it is not an element of damages you are to consider, but if he put labor in the house and is deprived of the rent, he is entitled to the value of his labor in the building to make him whole."

This instruction was excepted to, upon the ground that there was no evidence before the jury of any damage on account of the building of the house. There was evidence of respondent's expense in building the house, but it appears by the testimony of the respondent upon cross-examination, brought out over his counsel's objection, that up to the time of the trial he was still living in the house and that no rent

had been charged him. This fact, counsel for appellant argues, eliminates all question of damage on account of the building of the house, and hence it was error for the court to allow any such question to go before the jury. We do not think the mere fact that respondent was living in the house after the contract was repudiated by appellant about February 1, deprives him of his right to damages on account of having built the house preparatory to carrying out his contract. While appellant recognized the contract as in existence, of course respondent was living in the house under the terms of the contract. But appellant cannot be permitted to say, after its repudiation of the contract, that respondent was then living in the house under the contract. So it seems to us, whatever claims the appellant may have against the respondent on account of the occupancy of the house, after repudiation of the contract, could not have the effect of rendering respondent's right to this item of damage any less than at the date of the repudiation. The house was not built by respondent to be occupied by him independently of the contract and work to be performed thereunder. It is evident the year's work he had in prospect under the contract was the sole inducement for him to build the house, and he was to have it, as stated in appellant's answer, "free of rent as long as said employment continued." If appellant had claimed by its answer the value of the rent after its repudiation of the contract, as an offset or counterclaim, the question might have had a place in this cause; but even then it would only have been allowable to the extent of its actual value, and might or might not have been equal to the labor and expense incurred by respondent in building the house. It seems to us the question of rent, after the repudiation of the contract by appellant, when respondent was prevented from proceeding with the work, was not a matter to be considered under the issues in this case, and so far as the instructions submitted that matter to the jury, it was error against

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the respondent rather than against appellant, so it cannot complain.

We are of the opinion that the record shows no prejudicial error against the appellant. The judgment of the superior court is affirmed.

RUDKIN, C. J., DUNBAR, MOUNT, and CROW, JJ., concur.

[No. 7366. Department Two. July 6, 1909.]

J. W. ROMAINE *et al.*, *Respondents*, v. EXCELSIOR CARBIDE & GAS MACHINE COMPANY, *Appellant*.¹

VENDOR AND PURCHASER—RESCISSION BY VENDOR—FRAUD—NEGLECT OF VENDOR—LACHES—EVIDENCE—SUFFICIENCY. In an action to rescind a sale and trade of lands for money and stock in a corporation, for fraud in representing the financial standing of the company and the value of its rights, the evidence shows that the plaintiff was guilty of negligence and laches, precluding any recovery, where it appears that he was a competent business man and prominent in the community, that he consummated the trade relying upon promises that had not been fulfilled for such length of time as to have put him on inquiry, and thereafter, and while a stockholder, induced sales of treasury stock, and took no steps to rescind the sale for more than a year after the financial condition of the company was made public; especially where the property was of a speculative value and other's rights had become involved; and the same would be true of a co-plaintiff, a son, acting upon his father's advice.

Appeal from a judgment of the superior court for Whatcom county, Kellogg, J., entered January 11, 1908, upon findings in favor of the plaintiffs, after a trial on the merits before the court and a jury, in an action for cancellation. Reversed.

Waters & Radley, for appellant.

Fairchild & Bruce and *Crites & Romaine*, for respondents.

¹Reported in 103 Pac. 32.

DUNBAR, J.—This is an action in equity to set aside and rescind a sale and cancel a warranty deed made by the respondents to the appellant, conveying certain tide land property situated in the city of Bellingham, Washington. The consideration for the sale was \$1,500 in money, and eighteen hundred shares of the capital stock of appellant corporation. Contemporaneously with the filing of the complaint, respondents tendered the stock certificate and money to the amount of \$1,500 into court, and tendered the amount of taxes appellant had paid on the land. The complaint alleges as grounds for rescission that respondents were induced to sell their property to the appellant through fraud consisting of divers and sundry fraudulent representations. As compactly stated by the respondents in their brief, their contention is that they were induced to part with valuable property at a consideration very much below its worth, through representations of the officers of the appellant showing a condition of appellant's affairs contrary to the truth, without which inducement respondents would not have parted with their property. That is the substance of the complaint. To this complaint a demurrer was filed, to the effect that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled. The defendant answered, denying the pertinent allegations of the complaint. A jury was called to pass upon certain questions of fact, and returned answers thereto as advisory to the court. The jury found all pertinent facts in favor of the plaintiffs. The court also made findings of fact and decreed a rescission of the sale. From this judgment, this appeal is taken.

A brief recital of the case is to the effect that, some time prior to 1904, appellant had been manufacturing acetylene gas machines, in Spokane, Washington. It acquired a patent on a furnace for manufacturing carbide, and O. W. Ames, president of appellant company, came to Bellingham, in September, 1904, to investigate possibilities for a furnace there. The company at that time held a note against one

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James Muldowney, as part payment for stock, for \$19,900. Ames then went to Pittsburg to order a carbide furnace, but finding that he did not have sufficient means to pay for the same, it was not ordered. In May, 1905, he came back to Bellingham and, about the 1st of June, was introduced by A. A. Rogers to J. W. Romaine, and after a series of consultations Romaine and Rogers made the trade with the company which was set forth in the complaint. The Rogers' portion of the land afterwards passed to the respondent Roy C. Rogers, who signed the deed to the same. The record in this case is exceedingly voluminous, but we have examined it in detail and are forced to the conclusion that the evidence does not sustain the judgment. Hence, it is not necessary to discuss the error alleged in overruling the demurrer to the complaint, as a decision on the merits must be preferable to all parties concerned. Many authorities are cited to sustain the judgment, but in cases of this kind where circumstances are so varying, we have not found the authorities of assistance, as the facts in this case do not bring it within the rule announced in the authorities cited.

It appears from the record in this case, that the principal reason urged to support the right of rescission is that the carbide furnace, which it is alleged was promised by the appellant, was never furnished; that the machinery, which it is alleged the appellant represented to be on the way, never arrived; that it was finally discovered that the company did not have the means which it represented it did have to establish the carbide plant; that a large portion of the capital stock which it represented to be in cash was in reality in an unsecured note given by one Muldowney, which was not an available asset. On the question of the alleged representations, the testimony is conflicting, Mr. Ames, the manager of the company, swearing positively that the sale of the treasury stock was for the express and avowed purpose of obtaining means to procure the carbide furnace, and that no other representations were made by him.

But, conceding the truth of the respondents' testimony in regard to these matters, we think from the testimony of respondents themselves, (1) that they were guilty of negligence in not ascertaining the true condition of the appellant's finances, having ample opportunity so to do; and, (2) that they were guilty of laches in not acting promptly after they did so ascertain it. And here we may dispose of the contention of the respondents that they had three years in which to commence the action after the cause of action was known. That the question of laches in this kind of a case bears no relation to ordinary statutes of limitation, where conditions of others are not changed or the rights of others not imperiled by lapse of time, and that the principle of laches still adheres in the substance of equitable relief and is, therefore, to be determined by the court under the circumstances of each particular case, has been the settled rule of law in this state since the decision of the case of *Gay v. Havermale*, 27 Wash. 390, 67 Pac. 804.

The respondent Romaine was an attorney of standing and experience, learned in his profession, and evidently a bright, intelligent man. His standing and business capacity had been recognized by the community in which he lived, by his election to the office of mayor of the city of Bellingham. No fiduciary relation existed between him and Ames, the president and manager of the company, by whom he claims he was overreached; so that, in that respect at least, they stood on an equal footing. Ames was introduced to Romaine about the 1st of June, 1905, and immediately appealed to him to take stock in the concern. The evidence shows that, from this time on, Romaine and Ames were in close relations, having many consultations concerning the enterprise, Romaine evidently believing, not only that an investment would be a good thing for him, but that the establishment of the plant would be a good thing for the city. He should, therefore, have been doubly careful in examining into the merits of the enterprise.

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After all these consultations and examinations, Romaine, in a limited way acting as attorney for the company, on August 7, 1905, drew up a subscription contract, and he and A. A. Rogers, the confidential agent of the company, subscribed for five thousand shares of the stock at \$5 per share, and at that time agreed to sell the land in controversy to the appellant at the price stipulated. Romaine testified that it was his belief in the representations made by Ames that the furnace would be procured in five or six months from the time the representations were made, viz., the 1st day of June, 1905, that caused him to subscribe for the stock, and part with his tide lands. Yet the sale was not consummated until December 9, 1905, at which time there was evidently no appearance of the establishment of a furnace or of the arrival of the machinery which had been promised. The failure on the part of the appellant to carry out the representations made, and which Romaine says were the sole cause of his action, was sufficient to put upon him the duty of examination before finally acting in the premises. But again, after he had become a stockholder and had participated for many months in stockholders' meetings, he testified that he became suspicious of the good faith of the managers of the concern, and that his suspicions were aroused by the report of a committee appointed by the board of trade of the city of Bellingham to investigate the standing of the appellant incorporation. In that report it was developed that a certain amount of assets represented as cash was actually represented by the Muldowney note above mentioned. The report was made on December 13, four days after the sale of the land by respondents, and showed the exact financial condition of the appellant. No complaints, however, were made until February 1, 1906, when respondents complained that they had been deceived. Still they did nothing looking towards a rescission, until April 17, 1907, having in the meantime attended the stockholders' meetings, holding themselves out as supporters of the enterprise, Romaine testifying that

he always spoke a good word for the company, and there being testimony to the effect that he was instrumental in procuring subscriptions to the treasury stock.

To briefly recapitulate, it will be seen that, before the sale was consummated, the promises alleged to have been relied upon had not been fulfilled, and yet the transfer was made. But passing that, after the sale was made, more than a year and a quarter had elapsed after the financial condition of the corporation had been made public and brought to the attention of the respondents, before this action of rescission was brought. Taking this in connection with the fact that the property in controversy is of a speculative value, being tide lands, it must be seen that the respondents have been guilty of gross laches in not seeking relief sooner. Other people's rights have become involved, and respondents must not be allowed to speculate upon the success or failure of an enterprise before they determine whether they will cast their fortunes with it or cut loose from it.

All that we have said with reference to respondent Romaine applies, excepting as to his official capacity, equally to respondent Rogers. He unquestionably acted upon the advice of his father, who knew the history of the transaction from beginning to end. He was also working for the appellant company at the time he subscribed for the stock, and was guilty of the same laches in not sooner bringing his action for rescission. So far as concerns the representations made by Ames in relation to the value of the stock, and what it would probably be worth in the future, that was purely an expression of opinion, and must necessarily have been recognized as such.

Under all the testimony in the case, we are compelled to reverse the judgment with instructions to dismiss the action.

RUDKIN, C. J., PARKER, MOUNT, and CROW, JJ., concur.

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Syllabus.

[No. 7544. *En Banc.* July 8, 1909.]

HENRY SIPES, *Respondent*, v. PUGET SOUND ELECTRIC
RAILWAY, *Appellant*, and W. S. DIMMOCK,
Defendant.¹

APPEAL—REVIEW—HARMLESS ERROR. Evidence as to defendant's grades, cuts, and curves, not pleaded as negligence, is not prejudicial where it was introduced as descriptive of the place and to disprove contributory negligence, and the jury was instructed at the time that negligence of the defendant could not be predicated thereon.

MASTER AND SERVANT—NEGLIGENCE—RAILROADS—FLAGGING SYSTEM—EVIDENCE OF CUSTOM. Evidence of the system of flagging trains in use on other roads of like character is competent upon an issue as to defendant's negligence in employing an unsafe system which resulted in a collision.

SAME. Upon an issue as to the safety of a train dispatching system, evidence tending to show what would have been a safe and proper order for the running of a train is admissible for the purpose of comparison.

APPEAL—DECISION—LAW OF CASE. An instruction not excepted to, that a brakeman on an interurban electric railway, sent ahead by a conductor to flag another train, is a fellow servant of the conductor, becomes the law of the case.

MASTER AND SERVANT—NEGLIGENCE—RAILROADS—PROMULGATION OF TRAIN RULES. The sufficiency and reasonableness of rules and regulations promulgated for the running of trains is a mixed question of law and fact where there were other and safer methods.

SAME—COLLISION OF TRAINS—CONCURRENT NEGLIGENCE—PROXIMATE CAUSE. Where a collision was caused by the negligence of a flagman, sent ahead under verbal orders to flag trains at a certain station, where there were two other methods of flagging that would appear to be safer, and the company had tacitly admitted that the prevailing method was unsafe; the negligence of the company in failing to promulgate proper rules concurs with the negligence of the flagman as the proximate cause of the accident; as the facts constitute a continuous succession of events that should have been anticipated.

SAME—CONTRIBUTORY NEGLIGENCE—FAILURE TO OBSERVE RULES. Contributory negligence of a motorman cannot be predicated on his failure to give his brakeman a written order to flag a train, as re-

quired by the rules of the company, where the rule was habitually disregarded and had not been properly promulgated or posted or brought to plaintiff's notice.

MASTER AND SERVANT—JOINT LIABILITY—VERDICT EXONERATING NEGLIGENT SERVANT—JUDGMENT. A verdict in favor of the servant exonerates the master, in an action against an electric railway and its general manager for injuries received by a motorman in a collision, where the only evidence of negligence was that charged against the general manager in failing to promulgate proper train dispatching rules.

MASTER AND SERVANT—NEGLIGENCE—RAILROADS—TRAIN DISPATCHING SYSTEM—TELEGRAPH STATIONS. In an action for injuries received in a collision resulting from failure to promulgate proper train dispatching rules, negligence cannot be predicated on failure to establish telegraph or telephone stations at a point, when the orders were correctly received by telephone at that point; nor upon the fact that the accident would have been avoided by maintaining a telegraph station at some particular point on the road, when stations were maintained from five to eight miles apart.

Appeal from a judgment of the superior court for King county, Albertson, J., entered April 11, 1908, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a conductor of a railway train through a collision. Reversed.

James B. Howe, Hugh A. Tait, and A. J. Falknor, for appellant.

John E. Ryan, for respondent.

RUDKIN, C. J.—The Puget Sound Electric Railway operates a third-rail electric railroad between the cities of Tacoma and Seattle, a distance of thirty-six miles, over which in the neighborhood of one hundred trains of all classes are run daily. Regular passenger trains make the distance between the two cities in one hour and twenty-five minutes. The defendant Dimmock is manager of the road, and, among other things, is charged with the duty of promulgating rules and regulations to insure the safe operation of trains. The respondent, Sipes, was at the times hereinafter mentioned a conductor on one of the company's freight trains.

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On the morning of December 26, 1907, passenger train No. 3 was scheduled to leave Seattle at 6:30 a. m., arriving at Tacoma at 7:55 a. m. Passenger train No. 6 was scheduled to leave Tacoma at 7:10 a. m., arriving at Seattle at 8:30 a. m. The regular meeting or passing point for these trains was Milton, a station six and one-half miles north of Tacoma, but on the morning in question train No. 3 from Seattle was about ten minutes late and the meeting or passing place was changed to Edgewood, a point one and three-fourths miles north of Milton. About 7:00 o'clock on the morning in question, the train dispatcher ordered the plaintiff, Sipes, to take motor No. 626 from the Puyallup yards, two miles from Tacoma, and proceed to a gravel pit one and one-half miles north of Edgewood, flagging to Edgewood on train No. 6. The meaning of this order was that the plaintiff should send a flagman on No. 6, furnished with a red flag and torpedoes, with instructions to hold all trains so that motor No. 626 would have the right of way to Edgewood, following train No. 6. This order was received over the telephone and was communicated verbally by the plaintiff to his brakeman named Foss. The brakeman took his flag and torpedoes and boarded No. 6 at Puyallup yards. Train No. 6 then proceeded on its way to Seattle, followed by motor No. 626 in charge of the plaintiff as conductor. The flagman performed his duty satisfactorily until No. 6 reached Edgewood, but there, for some inexplicable reason, he failed to communicate his orders to the motorman and conductor of south bound train No. 3. As a result of this omission of duty on his part, train No. 3 passed No. 6 at Edgewood, without awaiting the arrival of motor No. 626, and the two trains (No. 3 and the motor in charge of the plaintiff) collided shortly after No. 3 left Edgewood, causing serious injury to the plaintiff, for which a recovery was sought in this action. From a judgment in favor of the plaintiff and

against the Puget Sound Electric Railway, this appeal is prosecuted.

The admission of testimony tending to show the grades, cuts, and curves along the line of the appellant's road is first assigned as error. This testimony was largely descriptive of the place of the accident, and the question seems to have been gone into in a limited way by the respondent on the erroneous assumption that the burden was on him to disprove contributory negligence—in other words, to prove that he was not at fault in failing to see the approaching train with which his own motor collided. The court explicitly instructed the jury at the time that negligence against the appellant could not be predicated on its grades, cuts, or curves, and the testimony was not prejudicial.

The ruling of the court admitting testimony tending to show the flagging system in use on other roads of like character is next assigned as error. The standard of due care is the conduct of the average prudent man. It would doubtless have been competent for the appellant to show that its flagging system was the one in general use on other roads of like character throughout the country, and it would seem equally competent for the respondent to prove that a like flagging system was not in use elsewhere. Such testimony would not be at all conclusive against the appellant, but it was proper for the consideration of the jury.

"In order to aid the jury in determining whether the defendant had exercised reasonable care in providing and maintaining the machinery actually in use, it was competent to show what other kind of machinery or appliances were used elsewhere, and might have been used at the shaft." *Myers v. Hudson Iron Co.*, 150 Mass. 125.

See, also, *Belleville Stone Co. v. Comben*, 61 N. J. L. 358, 39 Atl. 641.

The admission of testimony tending to show what would have been a safe and proper order under which to run the respondent's motor from the Puyallup yards to Edgewood is

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also assigned as error. Jurors as a rule are not familiar with the systems ordinarily employed in dispatching and running trains, and it would be impossible for them to determine whether the system employed by the appellant in this case was safe or dangerous, proper or improper, unless they were permitted to compare it with some other better, safer, and equally practical system which would accomplish the same result. The appellant was not required to adopt any particular system. It satisfies the requirements of the law when it adopts and enforces a system that is reasonably safe. The safety of the system adopted, however, was the question at issue in this case, and in determining that issue the jury were entitled to know what other practical system or systems might have been adopted to accomplish the same result. See cases above cited.

The next three assignments go to the sufficiency of the evidence to sustain the verdict and judgment. In the consideration of these assignments we only deem it necessary to allude to two of the grounds of negligence charged in the complaint: namely, negligence of the flagman Foss and the failure of the appellant to promulgate and enforce reasonable rules and regulations to insure the safety of its employees. The court below charged the jury that the respondent and the flagman Foss were fellow servants, and that no right of action would accrue to the former for injuries suffered through the negligence of the latter. We accept this charge as the law of the case, and it only remains to consider whether any negligence on the part of the appellant concurred with the negligence of the flagman in producing the injury complained of. The appellant contends, that if the verbal order given to the flagman had been properly executed it would have proved an absolute safeguard against the collision; that whether the rules and regulations were reasonable and sufficient presents a question of law for the decision of the court; that the negligence of the flagman was the proximate cause of the injury, and that the respondent was

guilty of contributory negligence in failing to give a written order to the flagman as required by certain bulletins promulgated by the appellant. The bulletins referred to are as follows:

"Bulletin No. 766. Tacoma, October 24, 1905. Puget Sound Electric Railway. Train Master's Office. All concerned:—Hereafter when it becomes necessary for conductors to send brakemen on passenger train, or other trains, to a station ahead to flag, instructions must be given to the brakeman in writing, what he is to flag, the name of station plainly written where he is to stop, for example: Riverton, October 23rd, 1905. A. B. Smith, Brakeman. Go to Davis on No. 46 and hold all south bound trains except first class trains until extra No. 626 north arrives. C. L. Jones, Conductor Extra No. 626 No."

"Bulletin No. 832, Tacoma, June 7th, 1906. Puget Sound Electric Railway, Train Master's Office. All Conductors and Motormen:—Your attention is called to Bulletin No. 766, October 24th, 1905. I notice it is not being observed in all cases. It must, however, be done at all times. In addition to that the motorman who carries the flagman must be shown the authority held by the flagman as he must as a necessity act as protector of the train so flagged until he has safely landed the flagman at his destination."

We will consider these several contentions in their order. No doubt the verbal order if properly executed would have proved sufficient, but that is not conclusive upon the question of the adequacy of the system adopted. This question will be further considered in connection with the contention that the sufficiency and reasonableness of the rules and regulations presents a question of law for the decision of the court. This latter contention is supported by authority, but not, in our opinion, by the weight of authority or the better reasoning. No doubt rules and regulations may be so full and complete that a court may declare them reasonable and sufficient as a matter of law, or they may be so faulty and defective that a court will not hesitate to declare them unreasonable and deficient as a matter of law, but between these extremes there is

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of necessity a debatable ground, where the question of the reasonableness and sufficiency of rules and regulations is a mixed question of law and fact to be determined by the jury under proper instructions from the court. *Warn v. New York Cent. etc. R. Co.*, 29 N. Y. Supp. 897; *Sheehan v. New York Cent. etc. R. Co.*, 91 N. Y. 332; *Abel v. Delaware & H. C. Co.*, 103 N. Y. 581, 9 N. E. 325, 57 Am. Rep. 773; *Chicago B. & Q. R. Co. v. McLallen*, 84 Ill. 109; *Illinois Cent. R. Co. v. Neer*, 31 Ill. App. 126; *Bass v. Chicago & N. W. R. Co.*, 36 Wis. 450, 17 Am. Rep. 495; 34 Cent. Dig., Title, Master and Servant, § 1038.

We think this case falls within the latter class. Here at least three different methods of dispatching trains were disclosed by the testimony; namely, sending the flagman ahead with verbal orders to hold other trains, as was done in this case; running the motor as a second section of train No. 6, in which case No. 6 would carry green signals and all other trains would leave the track clear until the second section or motor had passed; and the rule prescribed by the two bulletins above referred to. As between these several methods the latter two would seem much the safer. A number of experienced railroad men testified that a verbal order is unsafe and that such a system is not in use elsewhere. Aside from this, the terms of such an order rest in the memory of a single person, and its proper execution rests solely in his fidelity. If the motor were run as a second section of No. 6, all other trainmen would see the signals and govern themselves accordingly. If the method prescribed by the bulletins were adopted, the flagman would not forget his orders, and the motorman with him would act as a check and stop all other trains until the order was safely delivered. Indeed, the above bulletins, especially the second, tacitly admit that the prevailing practice was improper at least, if not unsafe. Under these circumstances, we think the jury were warranted in finding that the negligence of the appellant concurred with the negligence of the flagman in producing the injury.

What was the proximate cause of the accident? Proximate cause has been thus defined:

"The true rule is, that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft-cited case of the squib thrown in the market-place. 2 Bl. Rep. 892. The question always is, Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held, that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." *Milwaukee etc. R. Co. v. Kellogg*, 94 U. S. 469.

The appellant contends that the negligence of the flagman was the proximate cause; but, if verbal orders are unsafe, was not the flagman the mere instrumentality of an inadequate system? If such orders are unsafe it must be because men will misinterpret, misunderstand, and forget, and was not the appellant chargeable with notice of these human infirmities and should it not have foreseen the result? For these reasons the negligence of the master concurred with the negligence of the flagman in producing the injury, and in such cases the master is liable. *Ryan v. Delaware & Hudson R. Co.*, 114 App. Div. 268, 99 N. Y. Supp. 794; *Coppins v. New York Cent. etc. R. Co.*, 122 N. Y. 557, 25 N. E. 915, 19 Am. St. 523; *Merrill v. Oregon Short Line R. Co.*, 29 Utah 264, 81 Pac. 85, 110 Am. St. 695; *Gray v. Washington*

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Water Power Co., 27 Wash. 713, 68 Pac. 360; 21 Am. & Eng. Ency. Law (2d ed.), p. 487; 34 Cent. Dig. §§ 515-525.

The failure of the respondent to give a written order to the flagman, as required by the bulletins above referred to, would constitute such contributory negligence on his part as would bar a recovery, but the testimony tends to show that this requirement was habitually disregarded, and the jury found that the respondent had no knowledge of the bulletins and was not chargeable with notice of their contents, because they had not been properly promulgated or posted.

Lastly, it is contended that the only negligence charged against the appellant was the negligence of the defendant Dimmock and the negligence of the flagman Foss; that the jury found in favor of the defendant Dimmock, and the court instructed that the appellant was not answerable for the negligence of the flagman, and that, therefore, judgment should have been directed for the appellant notwithstanding the verdict, on the authority of *Doremus v. Root*, 23 Wash. 710, 63 Pac. 572, 54 L. R. A. 649, and other cases in this court following that decision.

This contention must be sustained. The decision in *Doremus v. Root* is based upon the principle that the master and servant are privies in law, and therefore a judgment in favor of the servant, in an action to recover damages for a tort committed by the servant, is a bar to an action against the master to recover damages for the same tortious act of the servant. The principle of that case has been repeatedly reaffirmed in this court, and the case has often been cited with approval in other jurisdictions. *Friend v. Ralston*, 35 Wash. 422, 77 Pac. 794; *Stevick v. Northern Pac. R. Co.*, 39 Wash. 501, 81 Pac. 999; *Morris v. Northwestern Imp. Co.*, 53 Wash. 451, 102 Pac. 402; *McGinnis v. Chicago etc. R. Co.*, 200 Mo. 347, 98 S. W. 590, 118 Am. St. 661; *Chicago etc. R. Co. v. McManegal*, 73 Neb. 580, 103 N. W. 305, 107 N. W. 243; *Hays v. Chicago Tel. Co.*, 218 Ill. 414, 75 N. E. 1003, 2 L.

R. A. (N. S.) 764; *McCoy v. Louisville & N. R. Co.*, 146 Ala. 333, 40 South. 106.

The only difference between the *Doremus* case and the case at bar lies in the fact that in the former case the servant was charged with misfeasance, while here the charge is nonfeasance. This court has held, however, that the agent or servant is liable for both nonfeasance and misfeasance in this class of actions. *Lough v. John Davis & Co.*, 30 Wash. 204, 70 Pac. 491, 94 Am. St. 848, 59 L. R. A. 802; *Howe v. Northern Pac. R. Co.*, 30 Wash. 569, 70 Pac. 1100, 60 L. R. A. 949.

Applying the rule announced in these cases to the facts in the case at bar, we find it alleged in the complaint:

"That at the time of the injuries received by the plaintiff as hereinafter more particularly mentioned and described, the defendant, W. S. Dimmock, was the manager of the defendant corporation, and as such manager was vested with the management and control of the corporation of the line of electric railway aforesaid, and had full power and authority to make rules and regulations for the proper and safe operation of the defendant's cars and trains over said line, and it was his duty to issue and put in force all proper and necessary orders, rules and regulations for the safe operation of the defendant corporation's cars and tracks and to direct, and control the movement and operation of its trains and to have orders issued and transmitted for such purposes,"

and other allegations of like import. The admissions in the answer were as broad as the allegations of the complaint, and the servant defended on the ground that he had not failed in the performance of any duty devolved upon him under the allegations of the complaint. By the judgment in favor of the servant it was judicially established that he had fully discharged every duty assigned or imposed upon him, and that judgment inures to the benefit of the master. If the servant fully discharged the duties imposed upon him by the law and by the master, it follows, as a matter of course and as a matter of law, that the master did not and could not fail in

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the performance of these same duties. What charge of negligence is there in this case then that is not disposed of by the judgment in favor of the general manager? The respondent contends that the appellant was negligent in the following particulars: "(1) The failure of the railroad company to establish telephone and telegraph stations at Puyallup yards and Edgewood; (2) the failure of the company, by and through its trainmaster Lussier, to warn No. 3 of the approach of motor No. 626 upon which Mr. Sipes was working; (3) the failure of the company to promulgate and enforce proper rules and regulations; (4) for the unlawful issuance of the particular order under which Mr. Sipes was working; (5) the negligence of Foss in failing to flag No. 3."

No negligence can be predicated upon the failure of the appellant to establish telegraph or telephone stations at Puyallup yards. The respondent received his orders over the telephone correctly, and the manner in which the orders were transmitted in no way contributed to his injury. As to other telegraph and telephone stations, the proof shows that the appellant maintained telegraph stations from five to eight miles apart along the entire length of its road, in addition to certain telephone stations, and the bare fact that this particular accident might have been avoided by maintaining a station at some particular point on the road does not sustain a charge of negligence, or tend to show that the absence of such station was the proximate cause of the injury. It was not shown that the trainmaster violated any rule of the company in failing to notify south bound passenger No. 3 of the approach of motor No. 626, following north bound passenger No. 6, and if there was any negligence in that regard it was attributable to the rules of the company and not to the act of the trainmaster. The third and fourth charges of negligence are based exclusively upon the inadequacy of the company's rules and regulations, and the fifth upon the negligence of the flagman Foss.

The lower court instructed the jury that Foss was a fellow

servant of the respondent, and that no recovery could be had for his negligence. That instruction was not excepted to and has become the law of the case. A careful examination of the entire record convinces us that the negligence of Foss and the failure to adopt and enforce safe and proper rules for the operation of trains was the direct and approximate cause of the injury complained of. The charge of the court and the judgment in favor of the general manager preclude a recovery against the appellant on either of these grounds. We are satisfied that the jury did not understand the effect of their failure to find a verdict for or against the general manager, and for that reason we regret the necessity which compels us to direct a judgment in favor of the appellant, but the law is imperative and leave us no alternative. If plaintiffs will persist in joining the servant with the master in actions of this kind, they must recover against the servant or suffer the consequences attendant upon their failure so to do.

The judgment is reversed, with directions to dismiss the action.

ALL CONCUR.

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Opinion Per Crow, J.

[No. 7503. Decided July 8, 1909.]

**M. LAUBER, Plaintiff and Appellant, v. C. E. JOHNSTON,
Defendant and Appellant.**¹

SALES—CONTRACT—PASSING OF TITLE. Upon the oral sale of a certain stack of hay, then upon the premises of the vendor, agreed to contain fifty and one-half tons, upon which \$250 was paid, the title to the hay passes at once to the vendee, who assumed the risk of loss, even though the vendor was entitled to retain possession of a portion to secure full payment of the price.

SAME. Upon a sale of "all merchantable" hay upon the vendor's premises, which was to be separated from unmerchantable hay and baled by the vendor, and to be paid for at the rate of ten dollars per ton as removed from the premises by the vendee, the title to the hay does not pass until it is separated and baled, and the vendee assumes the risk of loss of the baled portion only.

Cross-appeals from a judgment of the superior court for Okanogan county, Steiner, J., entered December 3, 1907, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

E. W. Taylor, for plaintiff.

R. P. Hoskyn and *C. F. Sigrist*, for defendant.

Crow, J.—This action was commenced by M. Lauber against C. E. Johnston, to recover \$1,129.25 for hay sold. The trial court entered judgment in favor of the plaintiff for \$522.38. Both parties have appealed.

There being a cross-appeal, we will refer to the parties as plaintiff and defendant. The defendant has moved to dismiss the plaintiff's cross-appeal for want of a bond. The record shows that, within the statutory time, the plaintiff filed an appeal bond, sufficient in form and amount. The motion is denied.

The complaint pleads two causes of action, the first alleg-

¹Reported in 102 Pac. 873.

ing an oral sale of one stack of hay, containing fifty and one-half tons, made November 15, 1905, at \$9.50 per ton, upon which the defendant then advanced \$250. The second cause of action was based upon a written contract reading as follows:

"Party of the first part [plaintiff], for and in consideration of ten dollars in hand paid, the receipt of which is hereby acknowledged, and other payments to be made and things to be done by the party of the second part [defendant], as hereinafter enumerated, promises and agrees to sell to the party of the second part all the merchantable hay except that which has been sold previous to the date of this contract, at the rate of ten dollars per ton for each and every ton of merchantable hay on the ranch of the party of the first part, located and situated on the west side of the Okanogan river, and about eight miles south of the town of Oroville of said Okanogan county, Washington. Party of the second part hereby promises and agrees to buy all the merchantable hay for sale by the party of the first part, as above mentioned, and pay for the same at the rate of ten dollars per ton for each and every ton. Party of the second part further agrees to have said hay baled before taking from the ranch of the party of the first part. Party of the second part further agrees to pay for said hay at the rate above set forth in advance, before removing the same from the ranch of the party of the first part; that is to say if the hay purchased is all hauled away at once, then the said purchase price must be paid in full for all hay purchased; but should said party of the second part remove said hay in small quantities, then said purchase price shall be paid at the time of said removal. And in case the entire amount of hay is not removed before the first of June, 1906, then the entire amount due on the hay remaining on the ranch of the party of the first part, shall be paid for at that time. But the party of the first part will give the party of the second part further time to remove said hay from his ranch, if time is desired. Party of the second part promises to pay for the baling of the said hay, and all expenses connected therewith. The ten dollars received and paid on this contract shall apply on the purchase price of said hay."

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On this sale plaintiff claimed \$900, less the \$10 paid. The evidence shows that, after the defendant had hauled away five of the fifty and one-half tons of hay mentioned in the first cause of action, and after he had baled twenty-five tons of the hay mentioned in the second cause of action, all of the hay then remaining on the plaintiff's farm, including the twenty-five tons baled, was destroyed by fire. The controlling question on this appeal, therefore, is whether title had passed to the defendant. The trial court found that title to the fifty and one-half tons included in the first sale had passed to the defendant; that the title to the twenty-five tons which he had taken into his possession and baled had also passed to him, and entered judgment accordingly. The defendant contends that he had not acquired title to any of the hay, except the five tons removed, of the value of \$47.50, and that he is entitled to a return of \$212.50 of his advance payments, for which he demanded judgment. The plaintiff contends that title to all of the hay had passed; that he was entitled to recover for fifty and one-half tons at \$9.50 per ton on the first cause of action, and for ninety tons at \$10 per ton on the second cause of action.

The question as to when the title to personal property passes to a vendee under and in pursuance of a contract of sale, depends upon the intention of the parties. Whether the contract is executed or executory must be determined by its terms and purposes, the nature, conditions, and situation of the property sold, and the circumstances surrounding the parties. As to the first sale, there can be no serious question as to the intention of the parties. One certain stack of hay was selected and distinguished from others then on the plaintiff's land. The quantity of hay it contained was agreed upon at fifty and one-half tons. The purchase price was fixed. A partial payment was advanced, and the defendant removed a portion of the hay. The defendant, however, contends that he was not to remove the entire fifty and one-half tons until he made sufficient payments to settle for the same as taken.

The evidence on this point is conflicting, but even though the plaintiff was to retain the hay on his place until paid for, he did not retain the title, but the possession only. It is conceded that the terms of the first sale were fully agreed upon; that nothing remained for the vendor to do; that the selection was made, no further separation of the property being necessary. Under these circumstances we hold that title to the entire fifty and one-half tons immediately passed to the vendee, who then assumed the risk of loss, even though the vendor was entitled to retain possession of a portion of the property to secure full payment.

"When the terms of the contract of sale have been definitely agreed upon and the goods have been specifically ascertained, and nothing remains to be done by the seller except to deliver the goods, the effect of the contract, as between the parties thereto, will, unless a contrary intention appears, be to vest the title to the property immediately in the purchaser, even though the goods have not yet been delivered or paid for. The purchaser cannot, indeed, take the goods away until he has paid for them, unless a term of credit has been given, but the title and therefore the risk of the goods will be in him, and the seller may have his remedies for the price." *Mechem, Sales*, § 483.

See, also, *Newmark, Sales*, § 159; 2 *Schouler's Personal Property*, § 243. Mr. Mechem, in his work on *Sales*, at § 501, states certain rules that have been formulated to aid in ascertaining in doubtful cases the intention of parties to sales of personal property. The first rule is especially pertinent to plaintiff's first cause of action, and reads as follows:

"Where the terms of the contract have been definitely agreed upon, and the goods have been specifically ascertained, and nothing remains to be done by the seller except to deliver the goods, or by the buyer except to pay for them, the title will, unless a contrary intention appears, vest at once in the buyer, even though the goods have not been delivered or paid for. In this case, as has been seen, the buyer may retain possession until the goods are paid for; but it is possession which he thus retains and not title."

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The plaintiff was entitled to recover the full amount of his claim on the first cause of action, as allowed by the trial court.

The evidence shows that several stacks on plaintiff's land which were the subject-matter of the written contract of sale, contained unmerchantable hay which had to be separated from merchantable hay as the work of baling progressed, and that the defendant had separated and baled twenty-five tons before the fire occurred. The plaintiff contends that the total amount of merchantable hay subject to defendant's order, both baled and unbaled, was ninety tons, and that he is entitled to recover therefor. The trial court, however, held that title to twenty-five tons only had passed to the vendee; that being the entire amount of merchantable hay actually separated from the unmerchantable and baled by him. The evidence and circumstances sustain this finding and conclusion. There is much conflict of authority as to when title passes on a sale of personal property which must be selected and separated from a larger mass. In *Anderson v. Crisp*, 5 Wash. 178, 31 Pac. 638, 18 L. R. A. 419, this court, after discussing the case of *Kimberly v. Patchin*, 19 N. Y. 330, 75 Am. Dec. 334, said:

"But it must be admitted that if all the property in the mass is not of equal value something more *does* remain to be done. Thus, in the case at bar, another element is injected into the contract, and there is a question of relative values to be yet determined. The appellants did not buy a portion of an indistinguishable mass where all the component parts were of equal value; but their contract called for 162,000 merchantable brick, and the evidence was that the brick that were deemed unmerchantable were thrown aside and not counted in when they came to haul them, so that it is impossible to determine, before the segregation of the brick, not only what particular brick were sold, but what relative portions of the kiln were sold; and while, as we have said before, it may be conceded that the intention of the parties will be carried into effect if it can be ascertained, yet under this contract it is impossible to ascertain not only the particu-

lar brick sold, but the actual relative number of brick sold by reason of the unsettled question of what brick were and what were not merchantable, creating an element of uncertainty in the contract which does not exist in those cases where the vendor sells a certain number of bushels of grain or a certain number of gallons of oil, or tons of hay, in an undivided mass, where all the different portions are of equal value."

The written contract contemplates a sale of merchantable hay only. If, as the evidence shows, some of the hay was unmerchantable, it would seem to have been the intention of the parties that title should pass to the merchantable hay as it was separated and baled by the defendant. The trial court so found, and we will not disturb such finding.

The third rule stated by Mr. Mechem in § 501, *supra*, of his work on Sales, is pertinent to plaintiff's second cause of action, and reads as follows:

"Where, though the specific goods are in a deliverable condition, there still remains some act, like measuring, weighing or testing, in order to determine the price, where the price is to depend upon the quantity or quality of the goods, the title usually will not pass, in the absence of evidence of an intention to the contrary, until this act is done."

The judgment is affirmed. Neither party will recover costs on this appeal.

ALL CONCUR.

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Syllabus.

[No. 7787. Department One. July 8, 1909.]

**FIRST NATIONAL BANK OF WENATCHEE *et al.*, Respondents, v.
LEONARD FOWLER *et al.*, Appellants.¹**

STIPULATIONS—CONSTRUCTION. A stipulation that the issues in consolidated actions may be submitted upon their merits, on the pleadings in the several actions, which were to be considered as evidence, and the evidence submitted under the stipulations, should not be construed as a confession of judgment on a cross-complaint to which no answer was made, or as an admission of the relevancy of the pleadings, or as an estoppel to assert legal conclusions from the pleadings considered as a whole.

PRINCIPAL AND SURETY—MARSHALING ASSETS—PLEDGES—RIGHTS OF SURETY. Equity will not decree a marshaling of assets in favor of sureties in default, where it would defeat the right of a judgment creditor to satisfy his judgment out of pledged property.

PRINCIPAL AND SURETY—EXHAUSTION OF REMEDY AGAINST SURETY—STATUTES—APPLICATION. Under Bal. Code, §§ 5707, 5708, providing for determining the questions of suretyship as between defendants primarily and secondarily liable, and Laws 1899, p. 373, § 192, defining a person "primarily liable to be one who is absolutely required to pay the same," debtors who are expressly made principal contractors cannot avail themselves of the statute to determine equities between themselves, as against objection by the plaintiff.

SET-OFF AND COUNTERCLAIM—TORT IN ACTION ON CONTRACT. In an action on contract to subject pledged property to a debt, a claim in tort for plaintiff's conversion of part of the property is not a proper item for counterclaim.

CHATTEL MORTGAGES—PROPERTY INCLUDED—ESTOPPEL. The owner of a machine having included it in a chattel mortgage executed by him on behalf of a corporation of which he owned all the stock, is estopped to assert that the same is his property and not subject to the mortgage.

HUSBAND AND WIFE—COMMUNITY PROPERTY—EXEMPTIONS—CHATTEL MORTGAGES. A chattel mortgage by a husband upon exempt personal property is valid without being signed by the wife, and a waiver of the exemption.

¹Reported in 102 Pac. 1038.

Appeal from a judgment of the superior court for Chelan county, Steiner, J., entered April 3, 1908, upon findings in favor of the plaintiffs, in consolidated actions on contract, after a trial on the merits before the court without a jury. Affirmed.

Bevington & Finch and *Ira Thomas*, for appellants.

Reeves & Reeves, for respondents.

CHADWICK, J.—This case involves four suits consolidated under an order of the court. Suit number one is an action instituted by the First National Bank of Wenatchee against the Republic Press and Leonard Fowler and wife, to recover a balance due upon a note for \$7,000. To secure this note Fowler and wife executed a mortgage on certain lots in the city of Wenatchee, and a chattel mortgage on the press and plant of the Republic Press, a newspaper corporation doing business at Wenatchee. Suit number two was an action instituted by George A. Fisher, cashier of the plaintiff in the first suit, to recover from Leonard Fowler and wife a balance due upon three notes aggregating the sum of \$1,200. To secure these notes a second mortgage upon the lots above mentioned was given, and a chattel mortgage was given upon the private library belonging to the appellants, and a note executed by a third party was hypothecated as collateral security. Suit number three is an action instituted to recover the balance due upon a note for \$4,500, made by the Republic Press. To secure this note a chattel mortgage was executed, covering all of the personal property of the corporation. Suit number four is an action instituted to recover the balance due upon a series of notes given by Leonard Fowler to the Mergenthaler Linotype company, and afterwards transferred to George R. Fisher. Judgment was rendered in each instance in favor of the plaintiffs and against defendants.

The amounts due upon these several items of indebtedness

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are disputed by defendants Fowler and wife. The Republic Press defaulted in the court below. It is alleged by defendants, and must be accepted as an admitted fact in the case, that Leonard Fowler and wife own and control the great majority of the stock of the Republic Press, and are "the real parties in interest in the life, prosperity, and management of said corporation." The case was determined by the court upon the merits under a stipulation reciting:

" . . . that said consolidated actions may be submitted on their merits, in said suit No. 3, on Thursday, the second day of April, 1908, commencing at nine o'clock in the forenoon of said day, and that such submission be made in the following manner, to wit: Upon the pleadings now on file in said several causes of action, as consolidated in said suit No. 3, it being understood that the complaints filed by the several plaintiffs, in each of said suits, is to be considered as evidence, and the answers, cross-complaints and interpleaders filed by Leonard Fowler and Mary B. Fowler, his wife, are also to be considered as evidence, and the actions thus consolidated are to be submitted on the issues thus joined and the evidence thus submitted under this stipulation."

Reliance is had upon this stipulation for a reversal of the case. Appellants say:

"This cause ought to be easy of determination. The respondents are entitled to all they ask in their complaints; and to retain all the court gave them in the judgments, so far as amounts are concerned. This much has at all times been conceded. The only questions for consideration then are those suggested by the cross-complaint and interpleader. The consideration of these questions is simplified by the facts involved being undisputed. No answer was interposed to this cross-complaint and interpleader. On the contrary the facts therein pleaded were affirmatively confessed. This was the purpose and the effect of the stipulation entered into under which the case was tried. Treating the matters stated in such cross-complaint and interpleader as the evidence in the case, does such evidence present a case for the equitable cognizance of this court? If it does not, there is no reason for disturbing the judgment of the lower court. If it does,

however, then a proper balance should be struck between that which the appellants are entitled to and that which respondents are entitled to, and a final judgment rendered according to this balance."

If the effect contended for is given this stipulation, then the argument of counsel might be well founded; but after mature consideration, we are unwilling to so hold. We do not understand that the trial court or the attorneys for respondents understood that the stipulation was intended to operate as a confession of judgment or an admission of the relevancy of the allegations of the answers, cross-complaints, and interpleaders, or an estoppel to assert legal conclusions following a consideration of the pleadings, when considered as a whole.

The first position taken by appellants is that the assets of the Republic Press, if properly "handled," are sufficient to pay all its obligations as well as those undertaken in its behalf by appellants, and that the court should have decreed a marshaling of its assets before rendering judgment against them. Respondents are contract creditors and, having a judgment, are entitled to pursue the usual remedies. There is nothing in the cross-complaints or interpleaders that would warrant a court in denying or postponing their legal right to satisfy their judgment out of the pledged property. Equity will not displace one right for the purpose of upholding or asserting another. The right to marshal assets is based upon principles of equity and, however desirable it may be to the debtor to be allowed to direct the manner of satisfying the debt, he cannot, after default, claim the aid of equity to defeat or delay the performance of his contract.

Appellants invoke the aid of Bal. Code, §§ 5707 and 5708 (P. C. §§ 1330, 1331), and under them claim the right to have the question of suretyship determined upon the theory that the Republic Press is the principal debtor and that they are but sureties. The fault of appellants' contention lies in the fact that the sections referred to were designed to deter-

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mine the rights between a surety and principal, and in terms provide that such proceedings shall in no wise affect the proceedings of the plaintiff. Whatever the equities between the Republic Press and the appellants may be, they are by the express terms of their contract principals as to respondents. The general rule in this regard is supplemented by the statute, which provides:

"The person 'primarily' liable on an instrument is the person who by the terms of the instrument is absolutely required to pay same. All other parties are 'secondarily' liable." Laws 1899, p. 373, § 192.

The intent of this provision undoubtedly was to prevent the assertion of any right or the pursuit of any collateral inquiry in cases instituted upon a direct promise to pay. Appellants cannot be heard to raise the question of suretyship against the demands of the respondents. They are bound by their contract. Aside from the statute, the principle has been frequently decided by this court. *Anderson v. Mitchell*, 51 Wash. 265, 98 Pac. 951, and cases therein cited.

Appellants claim that they should receive credit for the sum of \$1,970, the value of a printing press which they allege the First National Bank has converted to its own use. Appellants have their action at law for this tort, and may recover the damages sustained in an independent action. Their claim is not a proper item of counterclaim. *Tacoma Mill Co. v. Perry*, 32 Wash. 650, 73 Pac. 801; *Wiltsie, Mortgage Foreclosure*, § 381.

A claim of like character is made for the value of the Mergenthaler Linotype machine. This is claimed as the property of appellants, and therefore not subject to the mortgage. The machine is described in the mortgage to the bank executed by appellant Leonard Fowler on behalf of the Republic Press. It was also mortgaged by Leonard Fowler as his own property. Having included it in the mortgage to the bank, which he executed on behalf of the Republic Press

of which he was, as he asserts, practically the sole owner, he should not be heard to assert the claim now put forth.

Lastly, it is claimed that the private library belonging to appellants cannot be taken under the mortgage, for the reason that it is exempt property and the appellant Mary Blanche Fowler did not join in the execution of the mortgage. The control and management of the community personal property is lodged in the husband, and a mortgage executed by him, whether covering exempt property or amenable property, is effective and in legal effect a waiver of all statutory claims or privileges arising out of its character or use. 12 Am. & Eng. Ency. Law (2d ed.), p. 209.

Taking the complaints and the relevant facts alleged in the cross-pleadings of appellants as true, we cannot draw any conclusion of law that will sustain appellants in any one of their several contentions.

The judgments of the lower court are affirmed.

RUDKIN, C. J., FULLERTON, GOSE, and MORRIS, JJ., concur.

[No. 7925. Department One. July 8, 1909.]

LAURA J. GRAHAM, *Appellant*, v. E. T. GRAHAM,
Respondent.¹

DIVORCE—DECREE—VACATION—DURESS. The courts have jurisdiction to vacate a decree of divorce for fraud in obtaining it, and a wife is entitled to the vacation of a decree, where she moved therefor within one month, and it appears that she was induced to enter a general denial and make no contest through the duress of threats by the husband to commit suicide, which were false and made to conceal his intention to marry another, and which affected her health and nervous system, she having a meritorious defense to the action.

Appeal from a judgment of the superior court for King county, Tallman, J., entered November 30, 1908, dismissing

¹Reported in 102 Pac. 891.

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a petition to vacate a decree of divorce, upon sustaining a demurrer thereto. Reversed.

Fred C. Brown, for appellant.

J. D. Bauer, for respondent.

CHADWICK, J.—On September 1, 1908, a decree of divorce was entered in the superior court of King county, dissolving the bonds of matrimony then existing between appellant and respondent. On October 1, 1908, appellant filed her petition under the statute, praying for an order vacating the decree, and for permission to withdraw her answer and defend the suit. For the sake of the discussion of the only legal proposition involved, we deem it necessary to set out, in part at least, the facts alleged in her petition. She sets up the original complaint, in which her husband had asked a divorce upon the ground that she had treated him with extreme cruelty, had refused to live with him, had heaped personal indignities upon him, rendering his life burdensome, and that there was such incompatibility of temper between them that they could no longer live together as husband and wife. No facts were alleged in his complaint that would have saved the pleading from an attack by general demurrer. To this complaint she had entered a general denial. The trial was had without her presence, and a decree entered, so far as the record shows, upon the respondent's testimony alone.

She further alleges that, prior to November, 1907, the relations existing from the time of their marriage in March, 1882, had been most amicable; that she had been a dutiful wife, and that he had been a fond, faithful, and indulgent husband; that from the time mentioned he began to grow cold and distant, and cease to manifest that love and affection that had so long characterized his conduct toward her; that in June, 1908, he requested her to procure a divorce; that this she refused to do; that his inattention and neglect then became more marked, until finally, with intent to deceive her as to his real motive, he more than once

threatened to commit suicide unless she consented to allow him to procure a divorce; that he procured a revolver and made a pretended attempt to take his life; that his conduct so terrorized her and their children that she was reduced in health and so shocked in her nervous system that she was induced to believe that he would commit suicide, and so she yielded to his demand; that thereafter, on August 28, he sent an attorney, whom he had employed, to her with a copy of the summons and complaint, together with an answer which he had prepared; that she signed the answer; that respondent thereafter telephoned her that he would take his life if she resisted the divorce or appeared in the courtroom at the hearing, all of which she believed, and for that reason she did not appear. She further alleges, that all of the facts set forth in his complaint were false and untrue; that his threats of suicide were made with fraudulent intent to cover his real purpose, which was to marry another, a purpose he had thereafter admitted to her; that she has a good defense to his complaint, and that he has neglected her and their children, so that they are in necessitous circumstances. It would seem that this recital were enough to warrant the court in vacating the decree, and we take it that it would have done so but for its conception of the case of *Metler v. Metler*, 32 Wash. 494, 73 Pac. 535, wherein this court said:

“The reasons for making this distinction between judgments in this particular action and judgments in ordinary actions are apparent. A decree of divorce affects the status of the parties, both with respect to their relations to one another and their relations to the public. By the terms of the statute, divorced persons may lawfully marry, after a limited time from the rendition of the decree, and to permit its vacation is to make it possible, under the guise of law, to inflict injury and suffering upon persons whose innocence entitles them to every protection the law can afford. It is therefore highly important, not only for the sake of the parties thereto, but also for the sake of such persons, that decrees of divorce should not be granted except for specific causes provided by law, proved and found by the court, in

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actions where the court has undoubted jurisdiction over the subject-matter and the parties; but it is also equally important that the decree, when once granted, be not disturbed by the court granting it."

The power of a court having jurisdiction of the parties to vacate a decree of divorce, once formally entered, is therefore squarely before us. In the *Metler* case the court also said:

"The court can, of course, lawfully vacate such decree when entered without jurisdiction, and perhaps where it is the result of fraud practiced on the court or the other spouse."

The *Metler* case was referred to in *McDonald v. McDonald*, 34 Wash. 293, 75 Pac. 865, wherein it was said:

"It would seem to be violative of fundamental principles to hold that a divorce decree, fraudulently procured, may not be timely assailed by the innocent party to the proceedings."

It would seem therefore that, notwithstanding the doctrine frequently announced that a decree of divorce will never be vacated because of the probable evil consequences following the severance of a new relation, bearing as it might after-begotten children, the better rule is that, notwithstanding the decree, a court will reopen and try the case if the decree is the result of a fraud practiced upon the other party or upon the court.

This rule is admitted in the case of *Lewis v. Lewis*, 15 Kan. 181, cited and relied upon by respondent, although the court refused to reopen the decree, finding no irregularity in the proceeding. This case, however, was distinguished in the later case of *Hemphill v. Hemphill*, 38 Kan. 220, 16 Pac. 457, wherein the rule here announced was declared. In the case of *Whitcomb v. Whitcomb*, 46 Iowa 437, cited by respondent, the distinction between the force of a decree entered upon constructive service, the statute having been strictly complied with, and a fraud upon the party or the court, is clearly pointed out. It was held that the decree

would not be vacated where summons was regularly had by publication, but that the court had power in all cases to vacate a decree obtained by fraud, even though the plaintiff may have subsequently married and become a parent. The case of *Ewing v. Ewing*, 24 Ind. 468, also relied upon by respondent, followed the case of *McQuigg v. McQuigg*, 18 Ind. 294. In the case of *Earle v. Earle*, 91 Ind. 27, after a careful review of all the authorities, the court held that a decree of divorce obtained by fraud may be vacated and set aside as any other decree thus obtained. Continuing, the court said:

"We think, therefore, that when such a wrong has been consummated in the obtaining of decrees of divorce, the courts have the right and owe the duty to set them aside and declare them null and void, and that so far as the case of *McQuigg v. McQuigg*, *supra*, and the cases following it conflict with the conclusion reached, they should be overruled. Very much good, we think, will come from the adoption of the rule in divorce cases, and no harm, provided the injured party is not negligent in moving upon the discovery of the fraud. Possibly, in some cases, a second husband or wife may innocently be made to suffer, but, with proper restriction, this is not more likely than in the reversal of decrees on appeal to this court.

"It is proper and right in the administration of the law to protect innocent third parties, who may marry a divorced man or woman, but it is quite as proper and important to protect the husband and wife and innocent children from fraudulent divorces. Some of the cases in this state, in which relief has been denied, are forcible illustrations of the necessity of the rule here adopted. The adoption of the rule is essential to the complete administration of justice, will tend to protect the courts and the family from fraud and wrong, and will serve as a warning to those inclined to practice such fraud."

The doctrine of this case has been followed in the later case of *Nicholson v. Nicholson*, 118 Ind. 181, 15 N. E. 223. The case of *O'Connell v. O'Connell*, 10 Neb. 390, 6 N. W. 467, is also relied on. That the force of this case as an authority had been weakened by the subsequent decisions of that

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court, was insinuated but not discussed by the court in *Smithson v. Smithson*, 37 Neb. 535, 56 N. W. 300, 40 Am. St. 504. It is unnecessary to review other cases cited by respondent and which only incidentally bear upon our discussion.

The reason for the better rule is aptly stated in *Brown v. Brown*, 58 N. Y. 609, wherein the chapter of the code, allowing vacation of decrees and judgments and the power of the court thereunder was clearly defined.

"Under that provision [in relation to opening judgments] the period of seven years must elapse before a judgment founded on publication can be reposed upon as final. It is obvious that such a provision is inappropriate to actions for divorce; they were therefore excepted from it. But the power which the courts had before the Code, over their own judgments and records, is not interfered with. It is not contended that section 135, or any other, takes away the power of the court to open a judgment of divorce entered upon default, where the summons has been personally served, and it would indeed be an anomaly to give so much greater effect to one entered upon publication that while the former could be opened by the exercise of the discretionary power of the court, the latter would be beyond the reach of any such power. We do not think that it was the intention of the act to produce any such unreasonable result."

The rule that such a decree may be vacated is sustained by the following authorities: *Edson v. Edson*, 108 Mass. 590, 11 Am. Rep. 393; *Adams v. Adams*, 51 N. H. 388, 12 Am. Dec. 134; *Body's Appeal*, 38 Pa. St. 241; *Zoellner v. Zoellner*, 46 Mich. 511, 9 N. W. 831; *Helmes v. Helmes*, 24 Misc. Rep. 125, 52 N. Y. Supp. 784; *Hamilton v. Hamilton*, 29 App. Div. 331, 51 N. Y. Supp. 365; *Elmgren v. Elmgren*, 25 R. I. 177; *Medina v. Medina*, 22 Colo. 146, 43 Pac. 1001; *Van Derveer v. Van Derveer*, 30 W. Law B. 96, 11 Ohio Dec. (reprint) 828; *Womack v. Womack*, 73 Ark. 281, 83 S. W. 937, 1136; *Bishop, Marriage & Divorce*, 1556; *Stewart, Marriage & Divorce*, 422; and, in the opinion of the writer, by the case of *Winstone v. Winstone*, 40 Wash. 272, 82 Pac. 268, as well as the *Metler* and *McDonald* cases.

It is contended, however, that, the lower court having had complete jurisdiction, a mere offer to prove that the decree was obtained as the result of perjured testimony and was fraudulently obtained is insufficient. Whatever the rule may be when the divorce proceeding is collaterally inquired into, it must be remembered that this is a direct application, timely, and diligently prosecuted, and no harm can result to any innocent person by a further inquiry as to the justice of respondent's cause.

Aside from these considerations, the interest of the public in all actions for divorce is such that a policy has grown up in accord with enlightened sentiment to discourage and deny divorces unless claimed upon proper grounds and sustained by an honest disclosure of the facts. There is much in the record that prompts further inquiry. The complaint did not, as the statute (Bal. Code, § 5730; P. C. § 4641), expressly provides, distinctly state the causes relied upon. Although the proceeding must have borne the earmarks of a divorce by consent or collusion, the prosecuting attorney was not called upon to inquire into the merits of the cause. It was in effect, notwithstanding the record, a decree by default. The fact that respondent, as it now appears, had prompted the whole proceeding, including the employment of an attorney who was willing to accept the questionable agency of appearing for the defendant, through the intervention of the plaintiff whose interest was hostile, was in itself, when promptly disavowed, a showing of fraud upon the law and upon the court calling for further inquiry. The demurrer admits the conduct of respondent prior to and subsequent to the entry of the decree; and while ordinarily the plea of coercion or duress would not be heard upon the facts alleged, when we consider the years of intimate relationship existing between these parties, the trust and confidence inspired by mutual interest in the rearing of children, it is not for us to say in this proceeding that appellant was not the victim of a well-founded dread that respondent, the father of her children,

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would take his life unless she submitted to his demand. His after-declaration that he intended to marry another was enough to disabuse her mind, make the cowardice of his silly threat stand naked and revealed, and recall the fact that her right had been taken from her without a hearing. It is not, as counsel says, an indication that she has allowed her "jealous and spiteful disposition to overcome her better judgment." In it we see the way of woman, and when it appears that she has been deprived of her right by a pretense that prevented a full inquiry, the interest of the public as well as that of the wife intervenes and demands a rehearing upon the full merits of the cause.

"Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of compromise; . . . these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and fair hearing." *United States v. Throckmorton*, 98 U. S. 61, 25 L. Ed. 98.

The order of the lower court sustaining the demurrer to appellant's petition and dismissing her from the court is reversed, and the cause remanded with instructions to the lower court to entertain her petition for the vacation of the decree.

RUDKIN, C. J., FULLERTON, GOSE, and MORRIS, JJ., concur.

[No. 7990. Department One. July 10, 1909.]

W. F. HAYS *et al.*, *Appellants*, v. G. B. PEAVEY *et al.*,
Respondents.¹

PROCESS—SUMMONS BY PUBLICATION—SUFFICIENCY. Under Laws 1897, p. 82, § 96, authorizing service of summons by publication directing the defendant to appear within sixty days after the date of the first publication, a summons requiring the defendant to appear within sixty days after the "service" of the summons is insufficient to confer jurisdiction to enter a default judgment.

EXECUTION—SALES—BONA FIDE PURCHASERS. The purchaser of a sheriff's certificate of sale under execution is not a *bona fide* purchaser as to defects in process on which the judgment was founded.

JUDGMENT—PROCESS—PUBLICATION. A valid personal judgment cannot be entered upon a service by publication.

PROCESS—SUMMONS BY PUBLICATION—STATING OBJECT OF ACTION. Where the object of an action was to ascertain and fix the amount of an indebtedness on contract and to direct the sale of attached property to pay the same, a summons for publication is irregular and misleading where it states that the object of the action is to recover a personal judgment in a specified sum for breach of the contract.

JUDGMENTS—VACATION—DISCRETION—APPEAL—REVIEW. The granting of a motion to vacate a default judgment within the statutory time will not be reversed except for abuse of discretion.

JUDGMENTS—DEFAULT—VACATION—GROUNDS. A default judgment in an action on contract is properly vacated where it appears that service of summons was made by publication and real property was attached, that the summons did not properly state the object of the action, and that a personal judgment was entered by default against the defendants so served without referring to the land attached, which was subsequently sold under execution.

Appeal from an order of the superior court for King county, Morris, J., entered December 2, 1908, vacating a default judgment, on motion of the defendants. Affirmed.

W. F. Hays, James B. Reavis, and T. L. Stiles, for appellants.

Peters & Powell, for respondents.

¹Reported in 102 Pac. 889.

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Gose, J.—This action was commenced on December 13, 1906, by the filing of a complaint, by an attempted service of summons by publication, and an attachment of real estate. Later the respondents Peavey and the Sound Timber Company appeared and interposed demurrers, which being overruled, they served their answers on October 12, 1907, to which replies were filed December 19, following. The issues thus joined have not been tried. After the service of the answers and on November 14, 1907, the appellant Hays caused a second summons to be published, requiring the respondents other than Peavey and the Sound Timber Company to appear and answer within sixty days after the 15th day of November, 1907. The object of the action is stated in the summons as follows:

“The action is brought to recover a judgment of eighty-seven thousand five hundred dollars (\$87,500), because of the breach of a contract existing between this plaintiff and the defendant G. B. Peavey; the breach of which being brought about and induced by each of defendants above named and their co-defendants; said rights under said contract arising out of the unpaid purchase price on certain timber lands described in plaintiff's complaint, and sold to said defendants by plaintiff.”

The land was not described in the complaint. On June 13, 1908, and while the cause was pending between the appellant and the answering respondents, and without notice to them, findings of fact and conclusions of law were made and filed, and a default and judgment were entered against the other respondents. One conclusion of law was,

“That the lands described in the bill of particulars and referred to in plaintiff's complaint, standing in the name of the Sound Timber Company at the time of the commencement of this action, is the property of the last above named defendants, subject to the attachment and judgment lien herein as the property of said defendants, for the purpose of plaintiff enforcing collection of his said judgment.”

The judgment was a personal one against all of the non-

answering respondents, for the sum of \$68,700, and interest at six per cent per annum from January 18, 1904. No property was described in the judgment and there was no order for the sale of the attached property. About forty thousand acres of timber land were levied upon before the entry of the judgment, and after its rendition were sold upon three several executions. On November 2, 1908, the execution sales were confirmed. On November 19, following, the intervener purchased the certificates of sale.

On October 27, preceding the sale and confirmation, the several respondents moved to vacate the judgment on the several statutory grounds. The motions were heard upon the record and the affidavits and counter affidavits of the parties. The affidavits tended to show that a copy of the second summons was mailed to respondent Dodge at Rock Island, in the state of Illinois, and that at such time he had been a resident of the territory of Oklahoma for three years; that a copy of the summons was mailed to the respondent Bawden at Davenport, in the state of Iowa, and that he had not resided in such state since 1905, and that for a year preceding the mailing of the summons he had been a resident of Seattle; that the other respondents did not receive a second summons. The affidavits also disclose the fact that the title to the real estate that had been levied upon and sold had been vested in the Sound Timber Company since 1901.

On December 2d the motion was sustained, and an order was entered vacating the judgment and sales had thereunder. An appeal has been taken therefrom. There was no basis in the complaint for the conclusion of law which we have set forth. The answers of the respondents Peavey and the Sound Timber Company joined issue on all the material matters set forth in the complaint, and pleaded affirmatively, (1) that the subject-matter of the action had been adjudicated against the appellant in a court of competent jurisdiction; (2) that the matters and things alleged in the complaint had been settled between the parties before the commencement

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of the action; (3) that the cause of action was barred by the statute.

The first summons was ineffectual to give the court jurisdiction, as it required the respondents to appear within sixty days from the date of service. *Thompson v. Robbins*, 32 Wash. 149, 72 Pac. 1043; *Smith v. White*, 32 Wash. 414, 73 Pac. 480; *Dolan v. Jones*, 37 Wash. 176, 79 Pac. 640. The intervener, having purchased the sheriff's certificate of sale, was not a *bona fide* purchaser. *Singly v. Warren*, 18 Wash. 434, 51 Pac. 1066, 63 Am. St. 896; *Lee v. Wrixon*, 37 Wash. 47, 79 Pac. 489; *Benney v. Clein*, 15 Wash. 581, 46 Pac. 1037. A valid personal judgment cannot be entered upon a service by publication. *Pennoyer v. Neff*, 95 U. S. 714.

The code (Bal. Code, § 4878; P. C. § 336), provides that a summons by publication shall contain a brief statement of the object of the action. The object of the action in this case was to have the court ascertain and fix the amount of the indebtedness due the appellant, and to direct a sale of the attached property to satisfy the amount found due. This was not stated. In view of this omission, the summons, if not void, which we do not decide, was at least irregular and misleading.

The granting of a motion to vacate a judgment within the statutory time is within the discretion of the court, and its action will not be reversed unless there has been an abuse of discretion. *Livesley v. O'Brien*, 6 Wash. 553, 34 Pac. 134; *McCord v. McCord*, 24 Wash. 529, 64 Pac. 748.

There was ample warrant in the record for the order vacating the judgment, and it will be affirmed.

RUDKIN, C. J., FULLERTON, and CHADWICK, JJ., concur.

MORRIS, J., took no part.

[No. 7991. Department One. July 10, 1909.]

SOUND TIMBER COMPANY, *Respondent*, v. J. F. BEARD *et al.*,
Appellants.¹

APPEAL—REVIEW—CESSATION OF CONTROVERSY. An order enjoining an execution sale will be affirmed on appeal where it appears that the controversy has ceased by reason of the vacation of the judgment upon which the execution was issued.

Appeal from an injunctional order of the superior court for King county, Morris, J., entered November 23, 1908, enjoining an execution sale, at the instance of the plaintiff. Affirmed.

W. F. Hays and *James B. Reavis*, for appellants.

Peters & Powell, for respondent.

Gose, J.—This is a companion case to *Hays v. Peavey*, ante p. 78, 102 Pac. 889. An execution was issued upon the judgment referred to in that case, directed to the sheriff of Snohomish county. In obedience to the command of the execution, he had levied upon certain real estate, and had advertised it for sale. Whereupon, on the application of the respondent, he was enjoined from the making the sale. This appeal is prosecuted from the order of injunction.

In view of the fact that the judgment upon which the execution issued has been vacated, there has ceased to be a controversy in this case. The order will therefore be affirmed.

RUDKIN, C. J., FULLERTON, and CHADWICK, JJ., concur.
MORRIS, J., took no part.

¹Reported in 102 Pac. 890.

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Syllabus.

[No. 7919. *En Banc*. July 10, 1909.]GRAYS HARBOR BOOM COMPANY, *Appellant*, v.J. P. O. LOWNSDALE *et al.*, *Respondents*.¹

APPEAL—RECORD—STATEMENT OF FACTS—CERTIFICATE BY SUCCESSOR ON DEATH OF TRIAL JUDGE. Bal. Code, § 5061, authorizes the settlement of a statement of facts, after the death of the judge who tried the case, by his successor in office; and if the judgment was rendered by a visiting judge in another county than that of his residence, his successor in office may certify the statement of facts while presiding as a visiting judge in such county.

EMINENT DOMAIN—DAMAGES—WATER COURSES—RIPARIAN RIGHTS—VALUE OF SHORE AS BOOM SITE. In condemnation proceedings by a boom company to condemn riparian rights of owners on the bank of a stream in which the tide ebbs and flows, the owners are not entitled to have the damages assessed with reference to the value of the property as a boom site; since the right to maintain a boom is not appurtenant to the uplands, the tide lands belong to the state, and the boom site may be granted by the state without reference to riparian ownership (RUDKIN, C. J., DUNBAR, and GOSE, JJ., dissenting).

SAME—TRIAL—DAMAGES. A verdict on the question of damages in a condemnation proceeding is not conclusive as to the amount of damages, if there was error in injecting into the case an improper element of damages.

APPEAL—REVIEW—EVIDENCE—ERROR NOT CURED BY INSTRUCTIONS. In condemnation proceedings, error in receiving evidence of an improper element of damages and refusing, in the presence of the jury, to strike out such incompetent evidence, which indirectly affected the verdict, is not cured by instructions to the jury that they should not consider that element in estimating the damages.

NAVIGABLE WATERS—LANDS UNDER WATER—RIGHTS OF STATE. Under Const., art. 17, § 1, the state owns the beds and shores of all navigable waters up to the line of ordinary high tide.

RIPARIAN RIGHTS—TIDE LANDS—EMINENT DOMAIN—DAMAGES. In condemnation proceedings of lands and shore rights for a boom site, a riparian owner is not entitled to damages for the probable value of his land for a mill site or for commercial purposes depending in any degree on the use of the tide lands embraced in the boom site.

¹Reported in 102 Pac. 1041; 104 Pac. 267.

EMINENT DOMAIN—DAMAGES—PROBABLE VALUE OF SHORE LANDS. To recover, in condemnation of shore lands, for the contemplated use of the lands as a mill site, the use must be shown to be available, and that means a possible use not dependent on the abandonment of the use of adjoining lands of another, or upon remote, uncertain or speculative contingencies.

EMINENT DOMAIN—DAMAGES—EVIDENCE OF VALUE—MEASURE. In determining the damages in condemnation proceedings, evidence of the price paid for the land more than fifteen years ago is inadmissible; the present value and the diminution by reason of the proposed appropriation being the true basis.

SAME—SHORE LANDS—DAMAGE BY LAWFUL MAINTENANCE OF BOOM. In condemnation for a boom site, the owners are entitled to compensation for the land taken and added inconveniences in getting to the navigable channel, and for damages by reason of erosions necessarily caused by the proper and lawful maintenance of the boom, and the changed use of the stream.

EMINENT DOMAIN — PREPAYMENT OF DAMAGES — APPEAL — COSTS AGAINST LANDOWNER. Under the constitutional provision prohibiting the taking of private property without just compensation being first made or paid into court, costs of an appeal, successfully prosecuted by the petitioner from an award of damages, cannot be taxed against the landowner, on remanding the case for a retrial to determine the proper damages; since the petitioner must pay all costs of the proceedings to ascertain the damages.

COURTS—RULE OF DECISION—FEDERAL QUESTION. The right of the owner of uplands, condemned for a boom site, to claim damages by reason of the value of his property as a boom site, does not raise any Federal question, where the state and not the abutter owned the tide lands condemned for the site.

Appeal from a judgment of the superior court for Chehalis county, Linn, J., entered October 26, 1908, upon the verdict of a jury rendered in favor of the defendant, awarding damages in condemnation proceedings. Reversed.

J. B. Bridges and Ben Sheeks, for appellant.

J. C. Cross and Thos. Vance (A. Emerson Cross, of counsel), for respondents.

CHADWICK, J.—This case was tried in the superior court for Chehalis county by the late Judge Linn. Judge Linn was at the time the judge elected and presiding in Thurston

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county. He overruled the motion for a new trial, and an appeal was taken, but before the statement of facts was ready for settlement, he died. Attempting to comply with the statute, the Honorable Mason Irwin, presiding judge for Chehalis county, called Honorable John R. Mitchell, who had been appointed and had qualified as Judge Linn's successor, to settle the statement of facts. Bal. Code, § 5061 (P. C. §678), reads as follows:

"If the judge before whom the cause was pending or tried shall from any cause have ceased to be such judge he shall, notwithstanding, settle and certify, as the late judge, any bill of exceptions or statement of facts that it would be proper for him to settle and certify if he were still such judge, and such acts on his part shall have the same effect as if he were still in office; and he may be compelled by mandate so to do, as if still in office. If such judge shall die or remove from the state while in office or afterwards, within the time within which a bill of exceptions or statement of facts, in a cause that was pending or tried before him, might be settled and certified under the provisions of this chapter, and before having certified such bill or statement, such bill or statement may be settled by stipulation of the parties with the same effect as if duly settled and certified by such judge while still in office. But if the parties cannot agree, and if such judge, when removed from the state, does not attend within the state and settle and certify a bill of exceptions or statement of facts in case one has been duly proposed, his successor in office shall settle and certify such bill or statement in the manner in this chapter provided, and in so doing he shall be guided, so far as practicable, by the minutes taken by his predecessor in office, or by the stenographer, if one was in attendance on the court or judge, and may, in order to determine any disputed matter not sufficiently appearing upon such minutes, examine under oath the attorneys in the cause who were present at the trial or hearing, or any of them."

We are asked to hold, (1) that the statute makes no provision for the certification of the facts occurring upon the trial, by a successor of the trial judge who may have died, and (2) that if a successor can so act, it was the duty of the

judge presiding in Chehalis county to perform that function. The only reference to the probable death of a trial judge in the statute is found in the words "if such judge shall die or remove from the state." The succeeding parts of the statute are drawn on the theory of removal from the state, and under a technical construction, it might be held that there was an omission affecting appellant's right of appeal. We think, however, that the clear intent of the statute is to cover any case, whether it be occasioned by death, disability, or removal from the state. To hold otherwise would deny a substantial right, if not a constitutional guaranty. The second point is also without merit. It is insisted that judges have successors, but courts are legal creations. Counsel says:

"When the case was tried it was tried by the judge of the superior court of Washington for Chehalis county, and while the personnel or judge of the court before whom the case was tried was a visiting judge, the successor in office of that visiting judge is not the one contemplated by the statute to settle and certify the statement of facts."

This argument furnishes its own answer. If it be sound, Judge Mitchell while settling the statement of facts was as much the judge of the superior court of Chehalis county where he was presiding as was Judge Linn who tried the case, or as is Judge Irwin, and was therefore a proper judge to certify the statement of facts. The motion to dismiss the appeal is denied.

This is a proceeding brought by the Grays Harbor Boom Company to condemn certain lands lying adjacent to its boom grounds, a tidal slough known as "Jessie" slough, and a way along it for the convenience of its employees, and the shore rights of respondents, all of which it alleges are necessary to the prosecution of its enterprise as a public boom company. The petitioner is a boom company organized under the laws of the state of Washington, and for a number of years last past has operated a boom on the Humptulips river. There have been a number of cases decided in

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this court involving the rights of the respective parties. In May, 1906, the company was enjoined by the superior court for Chehalis county from further use of its boom grounds to the injury of the banks and shores of respondents' lands. This case was affirmed on appeal. *Lownsdale v. Grays Harbor Boom Co.*, 44 Wash. 699, 87 Pac. 943. The decision was later modified so as to permit appellant to institute condemnation proceedings. This it did. In *State ex rel. Burrows v. Superior Court*, 48 Wash. 277, 93 Pac. 423, the question of necessity and the extent of appellant's right under its power of eminent domain was settled by this court, and the case sent back for trial on the question of damages. From an award in favor of respondents, the petitioner has appealed.

Numerous errors are assigned. All those which we regard as material go to the theory of damages entertained by respondents, and upon which the court permitted the evidence to go to the jury. The evidence of the respective parties varied in a wide degree. Respondents' witnesses fix the amount of the damages in sums running from \$25,000 to \$60,000, while the petitioner's witnesses fixed the value of respondents' lands in sums not exceeding \$2,000. It is insisted by respondents that we should not inquire into the question of damages, or grant a new trial because the verdict was excessive. To sustain this contention, they cite the opinion of Judge Hanford in the case of *United States v. Freeman*, 113 Fed. 370, wherein he said, upon the authority of *Seattle & Montana R. Co. v. O'Meara*, 4 Wash. 17, 29 Pac. 835; *Tacoma v. State*, 4 Wash. 64, 29 Pac. 847; *Long v. Billings*, 7 Wash. 267, 34 Pac. 936; and *Western American Co. v. St. Ann Co.*, 22 Wash. 158, 60 Pac. 158, that:

"I adhere to the ruling made by this court in the case of *U. S. v. Tennant* (D. C.) 93 Fed. 613, to the effect that in condemnation cases in this state the law does not authorize the court of original jurisdiction to set aside the verdict of a jury on the ground that the appraisal was erroneous or unfair. Upon a re-examination of the question I am con-

firmed in the opinion that the statutes of this state as expounded by its supreme court prescribe a special and peculiar mode of procedure distinct from the practice in civil actions. Therefore the provisions of the civil practice act authorizing courts in which actions are tried to set aside verdicts for error in assessment of damages are not applicable, and do not authorize the same courts to grant new trials in condemnation cases."

Without discussing the justice or propriety of that decision or the cases upon which it rests, the record indicates to us that it should not be applied here. Admitting that the rule is well founded, the cases do not hold that a verdict concludes the law of the case. Although if a case be tried without error a court should be reluctant to grant a new trial because of excessive damages, when an improper element of damages is injected into the case, it becomes the duty of the court to set aside the verdict. Petitioner was entitled to have the question of damages submitted on a proper measure. This the court did not do. Without quoting from the evidence, it is enough to say that the witnesses on behalf of respondents base their estimate of damages, in part at least, upon the value of the property as a boom site, or in consideration of its adaptability for a mill site or for commercial purposes. A motion was made to strike this testimony, and it was overruled by the court. The court did, however, instruct the jury as follows:

"In estimating the value or damage you must not take into consideration the special value to the company, by reason of its necessity, but the market value. Nor should you take into consideration, the value of defendant's property as a boom site."

"The waters of the Humptulips river and Jessie Slough in front of defendant's lands, are navigable waters, within the meaning of the law, and defendant, by reason of the ownership of the lands abutting on said river and slough, would have no proprietary rights in any boom site furnished by the channels of said waters, and would not be entitled to have the values of such boom site considered in estimating the value

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of his lands, as his proprietary interest does not come below the line of ordinary high tide."

These instructions correctly stated the law. The right of maintaining booms in a navigable tidal stream of the state is not a right incident or appurtenant to the uplands. Tide lands belonging primarily to the state, and subject to the rights of navigation to be determined by the secretary of war, may be granted or sold by the state without reference to any assertion of riparian ownership in the land conveyed. This boom site having been granted by the state, the loss of its use cannot be considered as an element of damages in a suit to condemn the rights and privileges appurtenant to the shore line. Hence, the rule applicable to the condemnation of land along nontidal streams is not pertinent, and the testimony should have been stricken by the court. The record indicates that the amount returned could not have been found by the jury without considering the objectionable testimony. A trial upon one theory and instructions of the court founded upon an entirely different theory present a most unusual situation, and under the circumstances of this particular case we are unable to say that the error of the court was cured by his instruction. The court had refused, in the presence of the jury, to strike out the incompetent testimony, and the jury might have been, and probably was, misled as to its effect. It was the duty of the court to try the case upon, as well as instruct, the law of the case. It was his duty to take away from the jury all of the testimony predicated upon the value of the property as a boom site, by specially calling their attention to his errors occurring on the trial; or when a verdict was rendered showing that the jury must have considered a wrong measure of damages, he should have granted a new trial. We have not overlooked the fact that some of the witnesses spoke of the property as valuable for commercial purposes or for a mill site. But this will not cure the error of the court. Respondents have all the rights in their lands that they ever had, and whatever they may be, they are

subordinate to and subject to the rights of the grantee of the state to maintain boom grounds in front of them. If, therefore, the probable value of the land for a mill site or for commercial purposes depends in any degree on the use of the tide lands now embraced in the boom site, it could not be considered a proper element of damages.

The trial court seems to have proceeded upon the theory that the general rights incident to riparian ownership along navigable streams apply in this case. Respondents cite a number of cases to sustain this theory, but all of them seem to turn on the theory that the owner of the land had title, not only to the upland but the land under the water, a condition which is not here present, and cannot be from the very nature of the case. The state has asserted title to the lands over which the tide ebbs and flows, and respondents' title carries them no further than the line of ordinary high tide. It would be useless, then, to review the authorities relied upon by respondents. The rule pertaining to the rights incident to ownership of lands along tidal streams over which the state had or might assert its ownership, was before the court in the early case of *Eisenbach v. Hatfield*, 2 Wash. 236, 26 Pac. 539, 12 L. R. A. 632. A careful review of the authorities impelled this conclusion:

"The result of our investigation of the authorities leads us to the conclusion that riparian proprietors on the shore of the navigable waters of the state have no special or peculiar rights therein as an incident to their estate. To hold otherwise would be to deny the power of the state to deal with its own property as it may deem best for the public good. If the state cannot exercise its constitutional right to erect wharves and other structures upon its public waters in aid of navigation without the consent of adjoining owners, it is obviously deficient in the powers of self-development, which every government is supposed to possess—a proposition to which we cannot assent. See *Galveston v. Menard*, 23 Tex. 349. Nor do we think this view in any way conflicts with the constitution of the state, but, on the contrary, we believe it is in strict harmony with it, when all its parts are construed

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together. We cannot think that the building by the state or its grantees of wharves upon shores of navigable waters would constitute either a taking or damaging of private property for public use, in contemplation of the constitution."

We are asked to distinguish this case in favor of respondents, upon the theory that the Humptulips river is a navigable stream, and not a bay, inlet, or arm of the sea. The right of the state is not to be measured by the name or character of the waters, but by the physical condition. Does the tide ebb and flow in the stream under discussion? If so, the constitution, § 1, art. 17, expressly asserts title "to the beds and shores of all navigable waters in the state, up to and including the line of ordinary high tide, in the waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes." While the doctrine of the *Eisenbach* case has been at times overlooked by this court, thus permitting an element of confusion to arise in our decisions, it is so clearly sustained by reason and authority, and so securely rests upon the constitutional provision just cited, that we consider it controlling in all cases of this character. In the recent cases of *Muir v. Johnson*, 49 Wash. 66, 94 Pac. 899, and *Brace & Hergert Mill Co. v. State*, 49 Wash. 326, 95 Pac. 278, it is cited as controlling. In the latter case the decisions of this court, as well as those of the supreme court of the United States, are collected, and need no further citation or review.

If this were not true as a matter of law, the testimony upon this feature of the case is too vague and uncertain to warrant a verdict. It is not shown that the use of respondents' lands for a sawmill is contemplated or even probable within any reasonable time, or that it could be so used independently of the lands occupied by petitioner. The contemplated use, in proper cases, must not only be available but valuable. In this connection an available use means a possible use, not a use contingent upon the abandonment of the use of adjoining property engaged by another in the public service of the

state, or upon conditions remote, uncertain, and speculative. *Chicago, Milwaukee etc. R. Co. v. Alexander*, 47 Wash. 131, 91 Pac. 626.

So far, then, as the element of commercial use becomes a subject for our review, the lands of respondents are not taken or damaged in the general sense. Damages, if any, are those resulting to shore rights, by erosion or flooding, for land actually taken, and the added inconveniences, if any, to the landowner in getting to and from the navigable channel reserved by the secretary of war. They grow out of, as they must in all cases, the nature of the use to which the stream will be put by appellant. Upon this theory, the admission of evidence as to the price paid by respondents in 1891, and accumulated interest on the purchase price, was immaterial and prejudicial error on the part of the court. The purchase was not so recent that any presumption of value at the present time could flow therefrom. 2 Lewis, *Eminent Domain* (2d ed.), 444; *Denver etc. R. Co. v. Schmitt*, 11 Colo. 56, 16 Pac. 842; *Dietrichs v. Lincoln & N. W. R. Co.*, 12 Neb. 225, 10 N. W. 718; *Omaha South R. Co. v. Todd*, 39 Neb. 818, 58 N. W. 289; *Lanquist v. Chicago*, 200 Ill. 69, 65 N. E. 681. The present value of the property at the time of the trial, and the consequent diminution in value by reason of the proposed appropriation, is the true basis for estimating damages. *Grays Harbor & Puget Sound R. Co. v. Kauppinen*, 53 Wash. 238, 101 Pac. 835.

We are asked to hold that no damages for which the law will render compensation can result to respondents by reason of such erosions as are necessarily caused by the proper maintenance and operation of appellant's boom; this on the theory that the boom is a lawful structure, and that no consequential damages can result from its use. A number of cases are cited, none of which are persuasive. They discuss questions involving the erection of piers, bridges, or obstructions to navigation under Federal authority. No land and no right incident to ownership was taken. In this case respondents

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are the owners of the shore line and the banks of the stream and, while their interests must give way to the public interest, they are entitled to damages accruing from the changed use of the stream, even though the proposed use be a lawful one. *Burrows v. Grays Harbor Boom Co.*, 44 Wash. 630, 87 Pac. 937; *Monroe Mill Co. v. Menzel*, 35 Wash. 487, 77 Pac. 813, 102 Am. St. 905, 70 L. R. A. 272.

The judgment of the lower court is reversed, and a new trial ordered.

FULLERTON, MORRIS, PARKER, MOUNT, and CROW, JJ., concur.

RUDKIN, C. J. (dissenting).—I am of the opinion that the jury had a right to take into consideration the value of the property for boom purposes under the decision of the supreme court of the United States in *Boom Co. v. Patterson*, 98 U. S. 403, 25 L. Ed. 206; and on the authority of that case, and for the reasons there stated, I dissent.

GOSE and DUNBAR, JJ., concur with RUDKIN, C. J.

ON MOTION TO RETAX COSTS.

[*En Banc*. Decided October 9, 1909.]

PER CURIAM.—A proceeding was brought by the Grays Harbor Boom Company to condemn certain lands and shore rights of respondents lying adjacent to its boom grounds. The boom company is organized under the laws of the state of Washington. Upon the trial of the cause, a certain amount of damages was awarded to the landowners, the petitioner here, and the boom company, considering itself aggrieved by such award, appealed to this court. The appeal was sustained, the judgment was reversed, and a new trial ordered. Following the reversal, the boom company filed a bill of costs in this court, amounting to \$172.85, which the clerk of this court taxed against the petitioner, the respondents in the original case. The respondents now petition this court to strike said cost bill, and for an order authorizing and

directing the taxation of costs in favor of respondents and against appellant.

This motion will have to be sustained. This court held, in *Peterson v. Smith*, 6 Wash. 163, 32 Pac. 1050, that in a case of condemnation of land under the provisions of the constitution, providing that no private property shall be taken or damaged for public or private use without just compensation having been first made or paid into the court for the owner, and until full compensation be first made in money or ascertained and paid into the court for the owner, the owner could remain quiet and be assured that, before his property was condemned, the county in that case must ascertain his damage and either pay him or pay it into the court for his benefit, and that the amount of his damage must be ascertained in a court, in a proceeding instituted for that purpose, and in which the defendant may appear and make a showing if he so desire. Under this provision of the constitution, and under the law as announced in the case just above cited, and all the subsequent cases on this subject, the landowner cannot be put to any costs whatever for the ascertainment of the damages. All costs must be paid by the condemning party until a valid judgment is obtained.

It is true, we held in *Kitsap County v. Melker*, 52 Wash. 49, 100 Pac. 150, that, where the award was appealed from by the landowner and the judgment in this court went against him, the condemning party, who was put to the expense of defending the appeal which proves futile, the landowner should pay the costs of such appeal; but that case has no bearing on the case in question, for here the landowner was contented with the award which he secured from the court trying the cause; and notwithstanding the fact that this court on appeal found that the award was too large, he is entitled to await the final determination of the question without taking any action whatever, and to be protected in his interests without costs to him until the question is finally determined by a valid judgment. The constitution says that

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the land shall not be appropriated until full compensation therefor be first made in money, or ascertained and paid into court for the owner. Now, the appeal in this case was for the purpose of ascertaining the value of the land. That value has not yet been judicially determined, for that will be the subject of consideration at the next trial of the cause.

A case squarely in point on this subject is *Matter of New York etc. R. Co.*, 94 N. Y. 287. There the court, in speaking to this point, said:

"The only point remaining to be considered is the appeal from the judgment for costs rendered by the General Term against the landowners, on reversing the order of confirmation and appointing new commissioners, amounting to \$120.70. We are of the opinion that the General Term had no power to award these costs. If the appeal to the General Term had been taken by the landowners, and they had been defeated, it may be that the court could, in its discretion, have compelled them to pay the costs to which they had subjected the company by such an appeal. But the appeal was taken by the company because it was dissatisfied with the amount awarded, and was a continuation of the proceeding instituted by it to ascertain the compensation payable to the landowners, to acquire their land against their will. In such a case to compel the landowners to pay any part of the expenses incurred by the company for the purpose of ascertaining the compensation, which proceedings were an indispensable condition of its right to take the land, would conflict with the constitutional right of the landowners to just compensation."

To the same effect is *Stolze v. Milwaukee etc. R. Co.*, 113 Wis. 44, 88 N. W. 919, 90 Am. St. 833, where many cases are cited sustaining the decision.

The motion will be sustained, and the bill of costs stricken, with costs to the petitioner.

ON PETITION FOR REHEARING.

[*En Banc.* October 15, 1909.]

PER CURIAM.—A petition for a rehearing has been filed in this case, in which it is urgently and earnestly contended that

respondents' right to claim the value of their property, considered as a boom site or as valuable for other commercial purposes, is a Federal question, and should be so treated by this court. Respondents are of opinion, that the decision of this court results in a taking of their property without due process of law; that their property is taken without just compensation, and that they are denied the equal protection of the laws, all of which is in violation of the rights guaranteed to the citizen under the constitution of the state of Washington, the Federal constitution, and the fourteenth amendment thereto. From this premise, the question of what is the proper measure of damages is re-argued.

If respondents were the owners of the tide land occupied by appellant, the authorities cited would unquestionably sustain their position. In the case of *Boom Co. v. Patterson*, 98 U. S. 403, 408, 25 L. Ed. 206, the principal case relied on by respondents, it was said that, upon condemnation,

"The compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future."

This rule has been accepted by almost every court in the Union. An altogether different condition is here presented. Appellant is not taking the property of respondents, as was done in the *Patterson* case. There the owner of the island involved had a riparian right, and with it the right to exercise every incident pertaining thereto. Owning the upland and the littoral and riparian rights, he was entitled to compensation for a possible use. As was said in *United States v. Seufert Bros. Co.*, 78 Fed. 520:

"Use for which condemnation was sought in that case was for the construction of log booms in the Mississippi river adjacent to the lands condemned. The owner might use his land for this purpose on his own or on public account. The use was not necessarily a public one, and required no public license, so long as the navigation of the river was not ob-

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structed. There is, therefore, no reason why the adaptability of the lands condemned for boom purposes was not a proper element to be considered in estimating the value of such lands."

In *Chicago etc. R. Co. v. Chicago*, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979, the court, after admitting the general rule announced in the *Patterson* case, says: "Mere possible or imaginary uses, or the speculative schemes of its proprietor are to be excluded."

Compensation is given for taking or injuriously affecting the property of the landowner. Damages must be predicated upon the property itself, or an incident of the property. When a possible use is dependent upon the acquisition of an interest in property of another, no right of compensation accrues. The interest may never be acquired. In the instant case, respondents would have no right to maintain a boom on the tide lands of the state were we to hold as respondents contend that we should. The boom ground occupied by appellant is not located upon the property of respondents, or upon any property in which they have an interest; nor does it cut off any riparian right, for there can be no riparian right over tide lands. *Lownsdale v. Grays Harbor Boom Co.*, *post* p. 542, 103 Pac. 833. The boom ground is not taken by appellant from respondents, but occupied in virtue of a license granted by the state over its own property, property that is held under a title resting in the sovereignty of the state. It would do violence to the laws of Congress and of this state, as well as the Federal and state constitutions, to hold that the state, being the owner of the tide lands situate within its boundaries, could not sell them or grant a license to use them without first paying their value to an upland owner; or, in other words, compel the purchase of a right from one who did not possess it, one who could not give, grant, or sell the right to maintain the use upon which the claim for damages is predicated. This prin-

ciple is recognized, but not discussed, in the *Patterson* case, page 408, wherein it is said:

"We do not understand that all persons, except the plaintiff in error were precluded from availing themselves of these lands for the construction of a boom, either on their own account or for general use. The clause in its charter authorizing and requiring it to receive and take the entire control and management of all logs and timber to be conveyed to any point on the Mississippi river must be held to apply to the logs and timber of parties consenting to such control and management, not to logs and timber of parties choosing to keep the control and management of them in their own hands. The Mississippi is a navigable river above the Falls of St. Anthony, and the state could not confer an exclusive use of its waters, or exclusive control and management of logs floating on it, against the consent of their owners."

It follows that respondents cannot be compensated for the loss of a boom site, for they had no boom site to lose. To possess it they must have obtained title to, or permission to use, the property of the state. This they did not do. They have all that they possessed prior to the institution of this proceeding, and are entitled to no compensation other than for the physical disturbances that will result to their uplands within the rule laid down in our former opinion.

While it would be interesting, it would not be profitable, nor is it possible within the scope of this opinion, to trace the conflicting theories whether the king (the public) originally held title to shore and tide lands in fee, or subject to the riparian or littoral rights of the upland owner. It is settled in this state. Mr. Farnham, in his recent work on Waters, § 43, says:

"But at the time the governments were established in the American states the doctrine had become settled that the shore was a separate class of property which might and commonly did belong to the owner of the adjoining upland, but which belonged to the Crown unless he could be shown to have parted with it. Therefore the new states took title to all the shore which had not been granted by the Crown, or the Crown grants of which they did not choose to recognize.

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This land they could dispose of as they could the other land which came to them by the transfer of the title from the Crown, and they could make whatever regulations they chose with respect to it. They might ordain, as did Massachusetts, that the grant of the upland would pass title to low-water mark; or they might expressly provide, as did Washington, that the title to the tide lands should remain in the public until expressly disposed of. Most of the states, however, made no express provisions upon the subject, and the question how far the title of the riparian owner extended was left to the courts for determination. The great majority of the courts acted upon the principle that, since the shore was a separate class of property and the grant from the state passed only what was expressly mentioned, therefore the shore did not pass with the grant of the upland."

The question is not a new one, but is consistent with the repeated rulings of this court, and is the only rule that will give force and effect to the assertion of title on the part of the state to its tide lands. The principal cases are cited in our former opinions. In the case of *Board of Harbor Line Com'rs v. State ex rel. Yesler*, 2 Wash. 530, 27 Pac. 550, the court said:

"The court is still of the opinion that, as against the state, a littoral owner, simply as such owner, can assert no valuable rights below the line of ordinary high tide. The somewhat careful examination which I have given this case has confirmed my opinion that at common law the sovereign power (resting in England in parliament) could take such lands without compensation, and absolutely exclude the littoral proprietors from any rights thereto. In fact, such is conceded to be the power of parliament by nearly all of the courts. Even those which have taken the strongest ground against the doctrine of the case above cited have admitted such to be the rule. . . . Here the people of a state are absolutely sovereign, except as controlled by the constitution of the United States; and I do not think that it can be successfully contended that the powers of the people of the states have been thus controlled as to the questions here involved. I am unable to find any clause of the constitution of the United States looking to such control, and, as I read the decisions of the United States supreme court, it has expressly

decided that the states are in no wise controlled in this matter. Acting within their sovereign power, as above recognized, the people of this state, in forming a constitution, saw fit to assert the title of the state to the lands in question, and having done so they are the only power that can interfere with such title. But it is said that, while such assertion of title is made in the constitution, it is so made subject to vested rights of the riparian owner to be asserted in the courts. I am of the opinion that this vested right cannot be held to be such as is incident to the riparian owner simply as such, but must be held to apply only to some special right held by such owner by way of improvements made under express or implied license from the representative of the sovereign power. To hold that the former was intended, would practically destroy the title of the state, and would, therefore, be inconsistent with the assertion of such title; while the latter construction will give force to every word, and make the provision in its entirety a consistent one. When the people say that they assert the state's title, it must be held to mean the entire and exclusive title. Of course the rights of the state, as above stated, are subject to the paramount right of the United States to regulate commerce and navigation."

In the case of *Bellingham Bay etc. R. Co. v. Strand*, 4 Wash. 311, 317, 30 Pac. 144, the court said:

"Appellant further contends that the amount of damages awarded is greatly in excess of the sum warranted by the proofs. In this regard it is not claimed that there was no testimony in the case which would warrant the verdict rendered. The contention is that all or nearly all of the witnesses that testified as to the value of the property taken were allowed by the court to include in their estimate of said value certain prospective rights to the lands below the line of ordinary high tide in the waters of Puget Sound. That the witnesses were allowed so to do is clear from the record, and we must, therefore, decide whether or not this prospective contingent right was a proper element to be taken into consideration in determining the value of the property taken. We think that it was not. At the time these proceedings were instituted there was no law in force giving to the littoral proprietor any rights whatever in said tide lands, and under the decisions of this court in regard to the rights of littoral

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proprietors in such lands the respondents had no valuable rights therein. It was left entirely to the legislature to say whether or not they should have any recognition as such littoral proprietors. Under these circumstances any value which was placed upon the property taken by reason of any rights which might or might not be bestowed upon it by legislation was too remote to constitute an element of value in proceedings of this kind."

In all the maze of cases bearing upon the abstract question involved, there are but few outside of the previous decisions of this court to offer as confirmation to those who demand authority rather than reason for the rule. In the case of *Cohn v. Wausau Boom Co.*, 47 Wis. 314, 325, 2 N. W. 546, it was held that, although in that state the upland owner had a riparian right to erect wharves and other structures on the shore lands, it is a private right resting, in the absence of prohibition, upon a passive or implied license by the public, is subordinate to the public use, and may be regulated or prohibited by law. The right to maintain a boom, under a law similar in all respects to our own, was sustained by the court. The court said:

"As against the riparian owners, within the limits specified in the statute, the state has only resumed its own. Otherwise, the title, possession and use of respondent's land remain intact. If the public action lessen its value, it is literally *damnum absque injuria*."

The doctrine of this case was sustained in *Falls Mfg. Co. v. Oconto River Imp. Co.*, 87 Wis. 134, 151, 58 N. W. 257, wherein the plenary power of the state over navigable streams wholly within the state was affirmed, and the right to maintain flooding dams under a state law was held to be a legitimate exercise of legislative power, although it deprived an upland owner of the free use of a water power operated under a statutory authority prior in time to that of the improvement company. In the course of its argument the court said:

"The legislature is primarily at least, the judge of the necessity of the improvement; and when it delegates the

power to a corporation, and the state does not question that the improvement made by the corporation is in conformity with the delegated power, it seems to us that neither the necessity nor usefulness of the improvement, nor the manner in which it is made, can be called in question by private parties.' To the same effect, *J. S. Keator Lumber Co. v. St. Croix Boom Corp.*, 72 Wis. 80-87; *Underwood Lumber Co. v. Pelican Boom Co.*, 76 Wis. 85. The same doctrine has been repeatedly sanctioned by the supreme court of the United States. Thus, in *Huse v. Glover*, 119 U. S. 543, it was held: 'If, in the opinion of a state, its commerce will be more benefited by improving a navigable stream within its borders than by leaving the same in its natural state, it may authorize the improvements, although increased inconvenience and expense may thereby attend the business of individuals.' "

In *Sutter v. Heckman*, 1 Alaska 81, 87, it was held that the riparian and littoral proprietor had no right to, or control over, the tide lands below high-water mark. In the discussion of the case the court said:

"It has been held by many of the state courts of last resort that the owner of lands adjoining navigable water, whether within or above the ebb and flow of the tide, has, independently of local law, a right of property in the soil below high-water mark, and a right to build out wharves, so far at least as to reach water really navigable. This same theory, under the influence of the state statutes, has been indulged in by the federal courts in a few cases; especially in *Dutton v. Strong*, 1 Black 23, 17 L. Ed. 29; *R. R. Co. v. Schurmeier*, 7 Wall. 272, 19 L. Ed. 74; *Yates v. Milwaukee*, 10 Wall. 497, 19 L. Ed. 984; *St. Clair v. Livingston*, 23 Wall. 46, 23 L. Ed. 59. But by the later decisions of the courts it is established that the rights of riparian or littoral proprietors in the soil below high-water mark of navigable waters are governed by local laws of the several states, subject only to the rights granted to the United States by the constitution. In the case of *Weber v. Harbor Commissioners*, 18 Wall. 65, 21 L. Ed. 798, Mr. Justice Field, in speaking of the right to occupy the tide lands, said: 'Any erection thereon without license is, therefore, deemed an encroachment upon the property of the sovereign, or, as it is termed in the language of the law, a 'purpresture,' which he may remove at pleasure, whether it tend

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to obstruct navigation or otherwise.' Again, in *Atlee v. Packet Co.*, 21 Wall. 389, 22 L. Ed. 619, a riparian proprietor had no right, without statutory authority, to build out piers into the Mississippi river, as necessary parts of the boom to receive and retain logs until needed for sawing at its mill by the water side. In *Hardin v. Jordan*, 140 U. S. 371, 11 Sup. Ct. 808, 35 L. Ed. 428, the court said: 'With regard to grants of the government for lands bordering on tide water, it has been distinctly settled that they only extend to high-water mark, and that the title to the shore and lands under water in front of lands so granted inures to the state within which they are situated, if a state has been organized and established there.' "

As a matter of equity, then, and not in recognition of any riparian or littoral right, the legislature has provided for the protection of those who had settled upon uplands abutting, or who had improved tide lands, upon the mistaken notion that they had thus acquired some rights of ownership. The improver and the upland owner may purchase at the state's price; thus protecting private interests and investments. Beyond this the state has not gone; and to now hold, after twenty years of settled policy, that a lease or license to use or occupy state tide land carried with it a burden of damages to be paid to an upland owner, would make the occupation of the tide lands all but impossible, and tend to restrain the development of our resources, our business, and our commerce. Indeed, in the opinion of the writer, the question has not been open to discussion since the case of *Shively v. Bowlby*, 152 U. S. 1, 56, 14 Sup. Ct. 548, 38 L. E. 331, was decided. In that case the reasoning of Justice Lord, of the supreme court of Oregon, was adopted as the law of the case. He said:

"From all this it appears that when the state of Oregon was admitted into the Union, the tide lands became its property and subject to its jurisdiction and disposal; that in the absence of legislation or usage, the common law rule would govern the rights of the upland proprietor, and by that law the title to them is in the state; that the state has the right to dispose of them in such manner as she might deem proper,

as is frequently done in various ways, and whereby sometimes large areas are reclaimed and occupied by cities, and are put to public and private uses, state control and ownership therein being supreme, subject only to the paramount right of navigation and commerce. The whole question is for the state to determine for itself; it can say to what extent it will preserve its rights of ownership in them, or confer them on others. Our state has done that by the legislation already referred to, and our courts have declared its absolute property in and dominion over the tide lands, and its right to dispose of its title in such manner as it might deem best, unaffected by any 'legal obligation to recognize the rights of either the riparian owners, or those who had occupied such tide lands,' other than it chose to resign to them, subject only to the paramount right of navigation and the uses of commerce. From these considerations it results, if we are to be bound by the previous adjudications of this court, which have become a rule of property, and upon the faith of which important rights and titles have become vested, and large expenditures have been made and incurred, that the defendants have no rights or interests in the lands in question."

The decision in this case does not depend upon the construction of a Federal statute, or of the Federal constitution, or any amendment thereto. The Humptulips river is a navigable stream entirely within the state of Washington, and, in the absence of any statute by Congress, a state has plenary power in regard to such waters. Obstructions in these waters may be offenses against the laws of the state, but constitute no offense against the laws of the United States, in the absence of a statute. *North Shore Boom & Driving Co. v. Nicomen Boom Co.*, 212 U. S. 406, 29 Sup. Ct. 355, 53 L. Ed. 574. The right of the state to dispose of the use of its tide lands is a question with which the Federal government has nothing whatever to do. Appellant, being in the lawful occupation of state land, has succeeded for the time being to all the rights of the state. It is exercising a public function within the law of the state.

"Acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though

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their consequences may impair its use, are universally held not to be a 'taking' within the meaning of the constitutional provision providing for compensation." *United States v. Certain Lands etc.*, 112 Fed. 622.

See, also, *Northern Transp. Co. v. Chicago*, 99 U. S. 635, 25 L. Ed. 336; *Gibson v. United States*, 166 U. S. 269, 17 Sup. Ct. 578, 41 L. Ed. 996; *Meyer v. Richmond*, 172 U. S. 82, 19 Sup. Ct. 106, 43 L. Ed. 384.

Legislation has proceeded upon one of two theories with reference to tide and shore lands. The one, that the state will recognize a riparian right in the upland owner and compel the public to subordinate its rights (except as to navigation) to his convenience. The other is that the title to all tide and shore lands is in the state, and may be sold, leased, or otherwise disposed of in aid of business and commerce, and without reference to the comfort and convenience of the upland owner. This state has asserted the latter doctrine. It will thus be seen that this case involves primarily the question of state policy. The state has a right to deal with its own property as its own. There is, therefore, no Federal question involved. The dissenting judges adhere to their former opinion.

The petition for a rehearing is denied.

[No. 7333. Department Two. July 10, 1909.]

JOHN STOCKAND *et al.*, Respondents, v. IRA HALL *et al.*,
*Appellants.*¹

TAXATION—DEED—FAILURE TO DESCRIBE PROPERTY—EJECTMENT—PLAINTIFF'S TITLE. As plaintiffs in ejectment relying on a tax title must recover on the strength of their own title, their actions must fall where the proof shows that the tax deed as filed with the county auditor and adopted as part of the records in his office did not include, or in any manner refer to, the premises in controversy, a description of which was interlined by some unknown person subsequent to its execution and filing.

ALTERATION OF INSTRUMENTS—TIME OF—PRESUMPTIONS. Proof that the interlineation in the public record of a tax deed was made subsequently, overcomes the presumption that it was made before execution.

SAME—PUBLIC RECORDS—CORRECTION—BURDEN OF PROOF. There is no presumption that an interlineation in a public record of a tax deed was made by the officer having custody of the record, and the burden of proof would be upon the party relying thereon to show that any correction made was authorized.

TAXATION—REDEMPTION—TENDER OF TAX—WAIVER. Taxes may be redeemed at any time before a valid tax deed is issued, and insufficiency of the tender therefor is immaterial where the tax title holder refused to consider a tender unless another outside claim was also paid.

Appeal from a judgment of the superior court for Jefferson county, Still, J., entered October 7, 1907, upon findings in favor of the plaintiffs, in an action of ejectment tried on the merits before the court without a jury. Reversed.

Trumbull & Trumbull, for appellants.

U. D. Gnagey, for respondents.

RUDKIN, C. J.—This was an action in ejectment to recover certain lots in the city of Port Townsend. The plaintiffs deraigned their title through a tax deed from the county

¹Reported in 102 Pac. 1037.

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treasurer of Jefferson county to Jefferson county, and a deed from Jefferson county to the plaintiffs. The defendants, on the other hand, are the owners of the premises, unless their title was divested by the tax deed through which the plaintiffs claim.

It appears from the record that some time prior to the 12th day of June, 1902, the county treasurer of Jefferson county instituted proceedings in the superior court of that county to foreclose the lien of a large number of delinquency certificates theretofore issued to the county. Such proceedings were had in that action that on the last mentioned date a general judgment of foreclosure was entered by default, against all pieces and parcels of land as to which no appearance had been made to contest the foreclosure. The present defendants, among others, appeared and contested the foreclosure, and as to them and their lands the cause was continued until a future day. Thereafter and on the 15th day of August, 1902, a judgment of foreclosure was entered as to the defendants and as to the particular tracts here involved. On the 10th day of January, 1903, the county treasurer issued a tax deed to the county, in book form, embracing and including therein a large number of tracts and parcels of land which had theretofore been sold for delinquent taxes, the deed reciting that the sales were made pursuant to the tax judgment of June 12, 1902. This deed was delivered to the county auditor and filed for record in his office. The county auditor adopted the original deed in book form as a part of the records of his office, and the same became Vol. 53 of deeds. The testimony clearly showed, and the court found, that the original tax deed as filed with the county auditor and adopted as a part of the records of his office did not include or in any manner refer to the particular property now in controversy, or to the tax judgment of August 15, 1902. The court further found that a description of this property was interlined in the original tax deed sub-

sequent to its execution and filing in the auditor's office, but by whom or when the interlineation was made did not appear from the testimony. Upon these facts the court gave judgment in favor of the plaintiffs, and the defendants have appealed.

In actions of this kind the plaintiff must recover on the strength of his own title, and not upon the weakness of that of his adversary. Furthermore, if the tax deed under which the respondents claim is void as to the lots here involved, it follows as a matter of course that the title is still in the appellants. In support of their tax title the respondents contend that there is a legal presumption that interlineations or alterations in written instruments were made prior to their execution, and that in any event the county treasurer has the right to correct his deed or to issue a new deed, whenever the first deed is for any reason irregular or void. The law does perhaps presume that an alteration in a written instrument was made prior to its execution and delivery, but such presumption must give way when it is proved clearly and unequivocally that the alteration was in fact made long after the execution and delivery of the instrument, as was done in this case.

But we are asked here not only to presume that the alteration or interlineation was made before the execution and delivery of the tax deed, but to go one step further and presume that the alteration or interlineation was made by the county treasurer or by his successor in office. As shown above, the former presumption has been destroyed by proof; and the latter, in our opinion, does not obtain. If there is any presumption at all as to the person by whom an instrument was changed or altered, the natural presumption would be that the alteration was made by the custodian of the instrument, in this case the county auditor. But where the instrument is a public record to which all persons have access as is the case here, no presumption whatever can be in-

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dulged. When it was shown on the trial that the tax deed was altered by interlineation after its execution and delivery so as to embrace and include the property in controversy, the burden shifted to the respondents claiming under the deed to show that the interlineation was authorized and legal; and this they did not attempt to do.

On the face of the record before us, therefore, there was no tax deed as to this particular property, and the respondents utterly failed to establish title in themselves. The question as to whether a certified copy of the tax judgment of August 15, 1902, was ever delivered to the county treasurer, and whether a sale was ever made under that judgment have been discussed in the briefs and oral arguments, but should we concede these facts in favor of the respondents it would avail them nothing. The owner of property has a right to redeem from taxes and tax sales at any time before the execution and delivery of a valid tax deed (Laws of 1889, p. 298, § 17; *State ex rel. Race v. Cranney*, 30 Wash. 594, 71 Pac. 50), and in this case an offer to redeem was clearly shown. Some question is raised as to the sufficiency of the tender made by the appellants, but the respondents refused to consider the tender, unless the sum of \$100 claimed to be due them, growing out of some independent transaction, was likewise paid.

The respondents having failed to show any title to the lots described in their complaint, the judgment is reversed with directions to enter judgment in favor of the appellants, upon the repayment of all taxes paid by the respondents, with interest from date of the respective payments.

CROW, PARKER, MOUNT, and DUNBAR, JJ., concur.

[No. 7868. Department Two. July 10, 1909.]

D. C. WILLIAMS *et al.*, Respondents, v. GEORGE B. COLE
et al., Appellants.¹

PUBLIC LANDS—LANDS UNDER WATER—SHORE LINE—ESTABLISHMENT—LITTORAL RIGHTS. Where the board of harbor line commissioners filed a plat fixing the shore line of a lake from 39½ to 139 feet distant from an adjacent city block, no part of the block abuts on the shore lands of the lake, and the line is conclusively fixed as to the owner of the block claiming a preference right to purchase shore lands, until vacated for error at the instance of the state or of a party in interest claiming that the shore line was located too far inland.

SAME—CONCLUSIVENESS—JUDGMENT—EXISTENCE OF STREET. In such a case, the existence of a street between the block and the shore land is conclusively settled by a final judgment against the city in which the court finds that there is no street, and no appeal was taken therefrom by the city.

SAME—RIGHT TO PURCHASE SHORE LANDS—ABUTTERS. The right of an abutting owner to access to the street in front of his property gives him no right as an abutting owner to the shores of a lake across or bordering on the other side of the street.

Appeal from a judgment of the superior court for King county, Albertson, J., entered March 21, 1908, upon findings in favor of the plaintiffs, in an action to quiet title, after a trial on the merits before the court without a jury. Affirmed.

Geo. B. Cole, for appellants.

Hastings & Stedman, for respondents.

RUDKIN, C. J.—This action was instituted to quiet title to an irregular shaped tract of land containing 63-100 of an acre, lying between block 2 of D. T. Denny's second addition to the city of Seattle and the shore line of Lake Union, as fixed and established by the Board of State Land Commissioners of this state. The city of Seattle and George B.

¹Reported in 102 Pac. 870.

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Cole and wife were made defendants in the action—the city, because it claimed a public street along the north line of block 2; and Cole and wife, because they claimed an interest in the shore lands lying below the line of ordinary high water in the lake, under a contract with the owners of the north half of block 2.

The court below found that the claims of the respective defendants were without right and gave judgment according to the prayer of the complaint. From this judgment the defendants Cole and wife have appealed, but no appeal was prosecuted by the city.

The appellants Cole and wife contend that the north half of block 2 of Denny's second addition abuts or fronts on the shore line of Lake Union; that a street extends along the north line of the block between the block and the lake; that there are no uplands between the block and the lake, save those occupied by the street, and that under their contract with the owners of the north half of block 2 they have a preference right to purchase the shore lands when offered for sale.

On the first day of July, 1907, the Board of State Land Commissioners of this state, acting as a Board of Harbor Line Commissioners, filed a plat of the shore lands of Lake Union with the county auditor of King county, pursuant to the act of February 4, 1907, Laws of 1907, p. 3. This plat located and fixed the shore line of the lake adjacent to block 2 at a point 39.5 feet beyond and north of the northwest corner of the block, and 139 feet beyond and north of the northeast corner of the block, so that the shore line thus established was distant from block 2 at all points from 39.5 feet to 139 feet. This action upon the part of the Board of State Land Commissioners fixed the shore line absolutely and finally until vacated or set aside, and for that reason if no other no part of block 2 abuts or fronts on the shore lands of the lake. If the Board of State Land Commissioners erred to the prejudice of the state by fixing the shore

line below the line of ordinary high water only the state can complain. A different question would be presented if a party in interest claimed that the shore line was located too far inland to the prejudice of his rights.

Nor is the question of the existence of the street along the north side of the block an open one, so far as these appellants are concerned. A final judgment has been entered against the city, from which there has been no appeal, declaring that there is no street there, and in the absence of fraud or collusion that judgment is binding upon the city and upon the general public as well. *Elson v. Comstock*, 150 Ill. 303, 37 N. E. 207; *O'Connell v. Chicago Terminal Transfer Co.*, 14 Ill. 308, 56 N. E. 355; Black, Judgments, § 584; 23 Cyc. 1269.

It may be that an abutting property owner has a right to or an interest in a street distinct and different from that of the general public, and is not foreclosed by a judgment against the municipality, but no such question is presented here. The appellants are not claiming a right of access to abutting property owned by them. They occupy the same relative position as any other member of the community, and as to them the judgment against the city is final and conclusive.

It follows, therefore, that the appellants have no right, title, claim or interest in the tract of land lying between the north line of block 2 and the shore line of the lake as fixed by the Board of State Land Commissioners. What if any rights they may have under their contract to purchase shore lands lying beyond the property in controversy cannot be determined in this action. The judgment is affirmed.

CROW, PARKER, MOUNT, and DUNBAR, JJ., concur.

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[No. 7905. Department Two. July 10, 1909.]

THE STATE OF WASHINGTON, *Appellant*, v. FRED BURNS,
Respondent.¹

CRIMINAL LAW—PLEAS IN BAR—FORMER ACQUITTAL. The dismissal of a previous complaint or information is not a bar to another prosecution under an information charging a felony, under Bal. Code, § 6916, expressly so providing.

GAMING—KEEPING GAMBLING RESORT—INFORMATION—SUFFICIENCY. A complaint or information for gambling, under the act of 1903, p. 63, is insufficient to support a conviction, where it fails to allege the commission of the crime in a place "where persons resort for the purpose of playing," etc., the statute clearly being intended to prohibit the maintaining of gambling resorts.

GAMING—INFORMATION—PLAYING FOR GAIN—SUFFICIENCY. A complaint or information for gambling under Bal. Code, § 7260 is insufficient to support a conviction where it fails to allege that the game was played "for money, checks, credits, or any other representative of value."

CRIMINAL LAW—PLEA IN BAR—FORMER ACQUITTAL—DEFECTIVE INFORMATION. The common law rule that an acquittal is no bar to another prosecution, if the indictment was so defective that it would not have sustained a conviction, prevails in this state, except where the acquittal was by a judgment on a verdict, as provided by Bal. Code, § 6904; hence the voluntary dismissal of such a defective charge is no bar to another prosecution.

Appeal from a judgment of the superior court for Kittitas county, Kauffman, J., entered September 18, 1908, dismissing a prosecution for gambling, upon overruling a demurrer to a plea of former acquittal. Reversed.

C. R. Hovey and *H. W. Hale*, for appellant.

RUDKIN, C. J.—On the 21st day of April, 1908, a complaint in writing was filed before one of the justices of the peace of Kittitas county, charging that the defendant herein Fred Burns,

"Did on or about the 21st day of April, 1908, in the county of Kittitas and state of Washington, unlawfully conduct

¹Reported in 102 Pac. 886.

a gambling game, to wit a game of draw poker, in the Senate saloon, in Ellensburg, said county and state, contrary to the statute," etc.

On the following day this complaint was dismissed on motion of the prosecuting attorney in order that an information might be filed directly in the superior court. On the date of dismissal of the complaint filed before the justice of the peace, the prosecuting attorney filed an information in the superior court charging that the defendant herein Fred Burns,

"Did in the county of Kittitas and state of Washington, in a certain building situate upon lot five (5) in block fifteen (15) in the Original Town of Ellensburg, known as the Senate saloon, on or about the twenty-first day of April, A. D., one thousand nine hundred and eight, unlawfully and feloniously conduct, carry on and open a game of draw poker."

On the 19th day of June, 1908, the last mentioned information was dismissed on motion of the prosecuting attorney, and the defendant was held to await the filing of a new information. Thereafter a second information was filed charging that the defendant

"Did in the county of Kittitas and state of Washington, on or about the twenty-first day of April, A. D. one thousand nine hundred and eight, wilfully, unlawfully, and feloniously conduct and carry on a game of draw poker, then and there being a game played and operated with cards and chips and money, said chips then and there being representative of value; and that said game was played, carried on and conducted in a certain building situated upon lot five (5) in block fifteen (15) in the Original Town of Ellensburg, known as the Senate saloon, the same being a place where persons then and there resorted for the purpose of playing said game."

To this information the defendant pleaded the dismissal before the justice of the peace, and the dismissal of the first information filed in the superior court in bar, setting forth *in extenso* the records in both courts. The state demurred

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to the plea of former acquittal, but its demurrer was overruled. The state then elected to stand upon its demurrer, and from a judgment of dismissal the present appeal was prosecuted.

It seems to us that the plea of former acquittal was bad, for two reasons; first, because the information to which the plea was interposed charged a felony under the act of February 16, 1903, Laws of 1903, p. 63, and in such cases the dismissal of a previous complaint or information without trial is no bar to another prosecution. It is said in the appellant's brief that the demurrer was overruled on the authority of *State v. Durbin*, 32 Wash. 289, 73 Pac. 373, but in commenting on that decision in the later case of *State v. Campbell*, 40 Wash. 480, 82 Pac. 752, the court said:

"What was really decided in that case was that, where a party had been charged with assault and battery and a *nolle prosequi* had been entered to such information for the purpose of allowing the prosecuting attorney to file an information charging the defendant with mayhem based upon the same state of facts, and where, upon the trial on the last information, the defendant was found guilty of assault and battery, such a proceeding was equivalent to trying the defendant twice for the same offense. But it will not do to lay down a rule to the effect that, in a case where, through inadvertence or misinformation of a prosecuting officer, a defendant has been charged with a misdemeanor—for instance, an assault and battery—and it afterwards eventuates that the actual crime committed was that of an assault with intent to commit murder, or even murder, the law must be content with punishing the defendant for the crime of assault and battery or allow him to escape punishment altogether, by reason of the inability of the state to dismiss the action for assault and battery and indict for the greater offense. Such a determination by a court would surely be the clogging, instead of the lubricating, of the wheels of justice."

A dismissal without trial is therefore no bar to another prosecution for a felony, under Bal. Code, § 6916 (P. C. § 1536), which provides that "An order for dismissal as provided in this chapter is a bar to another prosecution for

the same offense, if it be a misdemeanor; but it is not a bar if the offense charged be a felony." In the second place it seems quite apparent to us that the complaint filed before the justice of the peace and the first information filed in the superior court charged no crime whatever. It is manifest that the complaint and information failed to charge a crime under the act of 1903, *supra*, for that act applies only to games conducted "In any house, room, shop, or other building whatever, boat, booth, garden, or other place, *where persons resort for the purpose of playing*," etc. As was said by this court in *State v. Preston*, 49 Wash. 298, 95 Pac. 82, "This statute, as its title states, was clearly intended to 'prohibit the maintaining of gambling resorts.' " There was no averment in either the complaint or information to bring the offense within this statute. It seems equally manifest that the complaint and first information charged no crime under Bal. Code, § 7260 (P. C. § 1877), for under that section the game must be played "*for money, checks, credits, or any other representative of value*," and there was no such averment or allegation in either of these pleadings. Under § 7268 (P. C. § 1885), a person may play at any game of chance or skill for amusement or pastime only. To constitute a crime the game must be played for gain. *State v. Preston, supra*. For these reasons the first complaint and information were so far defective that they would not support a conviction and, in the absence of statute, an acquittal under such a pleading is no bar to another prosecution.

"In England an acquittal on an indictment so defective that, if it had been objected to at the trial, or by motion in arrest of judgment, or by writ of error, it would not have supported a conviction or sentence, has generally been considered as insufficient to support a plea of former acquittal; and this rule has generally been followed in the United States, except in cases expressly governed by some constitutional or statutory provision on the subject." 12 Cyc. 264.

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Syllabus.

See, also, *State v. Riley*, 36 Wash. 441, 78 Pac. 1001. Under Bal. Code, § 6904 (P. C. § 2157),

“A conviction or acquittal by a judgment on a verdict shall bar another prosecution for the same offense, notwithstanding a defect in form or substance in the indictment or information on which the conviction or acquittal took place.”

The common law rule prevails in this state except as modified by statute, and under the statute cited, an acquittal upon a defective information is no bar to another prosecution unless the judgment of acquittal is based upon a verdict after trial. In this case there was no trial and no verdict; hence the dismissals upon the defective complaint and information were no bar to a further prosecution. We have not been favored by a brief on the part of the respondent, but we can conceive of no ground upon which the plea of former acquittal can be sustained.

The judgment is therefore reversed, with directions to sustain the demurrer to the plea, and for further proceedings not inconsistent with this opinion.

CROW, PARKER, MOUNT, and DUNBAR, JJ., concur.

[No. 8026. Department Two. July 10, 1909.]

JAMES V. VAN HORN, *Appellant*, v. NEW WESTERN SHINGLE COMPANY *et al.*, *Respondents*.¹

PLEADING—DENIALS—ADMISSIONS IN ANSWER—CORPORATIONS—STOCKHOLDERS. The denial of each and every allegation of a complaint by one alleging himself to be a stockholder in a corporation does not put his ownership of stock in issue, where other portions of the answer are pregnant with admissions of such fact.

CORPORATIONS—STOCK—TRANSFER ON BOOKS—NECESSITY—WAIVER—ESTOPPEL. Bal. Code, § 4261, providing that transfers of stock in a corporation are void until entered on the books of the company is for the benefit of the company and may be waived by it; and a com-

¹Reported in 103 Pac. 42.

pany is estopped to deny that an assignee of stock not entered is a stockholder, after electing him a trustee and recognizing him as a stockholder by various acts.

TRIAL—ORDER OF PROOF—DISCRETION. In an action by a stockholder of a corporation for fraud, requiring the plaintiff to first establish his ownership of stock relates only to the order of proof, and is within the discretion of the trial judge.

CORPORATIONS—RECEIVERS—APPOINTMENT—COMPLAINT BY MINORITY STOCKHOLDER—SUFFICIENCY. A complaint by a minority stockholder of a corporation states a sufficient cause of action for a receivership, especially when liberally construed on demurrer *ore tenus*, where it alleges that one-third of its assets and capital, of the value of \$27,000, were dissipated through maladministration and incompetence in 1908, which will continue during 1909; that it is about to lose its mill site of the value of \$4,000 or \$5,000, and suffer irreparable injury by requiring a removal, through the same causes, and that the managers have illegally voted salaries to themselves to pay for stock purchased to control the company; and it is error to confine the proof to the last allegation, as that simply goes to other charges of maladministration alleged in the complaint.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered February 24, 1909, dismissing an action for the appointment of a receiver for a corporation, upon sustaining an objection to the introduction of any evidence upon the part of the plaintiff. Reversed.

Graves & Murphy and Charles H. Winders, for appellant.
Robert McMurchie, for respondents.

RUDKIN, C. J.—The complaint in this action alleges, in substance, that the defendant company is a corporation organized and existing under the laws of this state, and that the individual defendants are its executive officers; that the capital stock of the company is divided into 15,000 shares of the par value of \$1 per share; that in the month of January, 1908, the plaintiff became the purchaser of 4,125 of such shares; that at that time the assets of the company were of the value of \$27,000; that the company is the owner of a shingle mill equipped with modern machinery and all necessary appliances to give it a capacity of 250,000 shingles

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per day, and that during the entire year 1908 the mill was in good repair and the company had sufficient funds with which to operate the mill continuously at its full capacity throughout the year; that the company is not the owner of the real property upon which its mill is constructed, but holds the same under a contract by the terms of which it may acquire title by cutting an average of 140,000 shingles per day during each year for a definite period; that during the year 1908 the mill was under the sole management and control of the defendant Collins, who is secretary, treasurer, and general manager thereof; that the general manager receives a certain salary when the mill is running, and a certain other salary when the mill is idle, and allows himself certain sums for expenses, the nature and amount of which is to the plaintiff unknown, and that although the plaintiff has made repeated efforts to ascertain for what purposes such allowances are made, he has been unable to do so, by reason of the fact that the general manager has the sole and exclusive control of the books and papers of the company; that the defendant Collins is inexperienced and incompetent, and fails to properly direct the operations of the mill or to care for its property; that the mill was not operated to exceed one hundred days during the year 1908, although the same could have been operated at a profit during the entire year, and other mills in the vicinity no more favorably located were so operated; that the mill was operated at a loss of from \$7,000 to \$10,000 during the year 1908, making no deductions or allowances for depreciation in the value of the plant or machinery; that the individual defendants other than Collins occupy the positions of president and treasurer of the company and are mere figure heads, doing as Collins directs them to do; that they know that Collins is unfit mentally and physically to manage the mill or control its operations; that they have conspired together for the purpose of defrauding the plaintiff, who is a minority stockholder, and compelling him to invest larger sums in the mill; that during December,

1908, the individual defendants purchased outstanding stock for the purpose of obtaining and retaining absolute control of the mill, and have elected Collins as general manager thereof for the year 1909, giving him absolute control of the mill and its operations, and in furtherance of their fraudulent scheme and for the purpose of appropriating to themselves the assets of the company, and in order to obtain funds to pay for stock purchased by them to obtain control of the mill, well knowing that the company has been operated at a heavy loss, and well knowing that the value of the stock is depreciating and that the mill will continue to be operated at a loss under the management of Collins, the individual defendants placed him in sole charge and arbitrarily raised their own salaries; that the three individual defendants entered into an agreement the one with the other to vote their stock together for the purposes aforesaid; that if the defendants, and especially the defendant Collins, are permitted to manage and control the mill during the year 1909, the company will become insolvent, and all the plaintiff's interest therein will be dissipated and lost; that the individual defendants claim that, being majority stockholders, they can and will operate the mill as they please and pay themselves such salaries as they deem proper; that the defendants are threatening to encumber the mill to the amount of \$10,000 for which there is neither reason nor necessity; that the defendants have failed to comply with the conditions of the contract under which the mill site is held and if the present management is permitted to remain in control the mill site of the value of from \$4,000 to \$5,000 will be forfeited and wholly lost to the company, and the company will suffer irreparable injury by being compelled to remove its mill to another site, and a receivership is the relief sought.

Issues were framed by answer and reply and the cause came on for trial. At the commencement of the trial the court sustained an objection to the introduction of any testimony under the complaint, except under the allegation that the in-

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dividual defendants had wrongfully voted salaries to themselves, to which ruling the plaintiff excepted. The defendants next objected to the introduction of any testimony under the complaint, until the plaintiff first proved that he was a stockholder in the defendant company. The objection was sustained and an exception allowed. The plaintiff then proved that two certificates for 4,125 shares of the capital stock of the defendant company had been regularly issued to Frank Stuber and assigned to the plaintiff, and offered to prove that the plaintiff was recognized by the defendants as a stockholder in the defendant company from the time of his purchase of the aforesaid stock up to the time of the trial; that he received notice of stockholders' meetings from time to time; that he was twice elected a trustee of the company; that his name was carried on the letter-heads of the company as one of its trustees, and various other acts on the part of the company and its officers tending to show a recognition of the plaintiff as a stockholder of the company. To all these offers the court sustained an objection, holding that under Bal. Code, § 4261 (P. C. § 7063), the transfer of the stock to the plaintiff was void until entered upon the books of the company as required by that section. The plaintiff excepted to the ruling of the court; and from a judgment dismissing the action, this appeal is prosecuted.

The ruling of the court that the appellant was not a stockholder of the respondent company is erroneous for two reasons. First, we do not think that the appellant's ownership of the stock was put in issue by the answer; for while the answer denied each and every allegation of the complaint, except as therein expressly admitted, modified, qualified or explained, there was no express denial of the allegation that the appellant was a stockholder, and other portions of the answer are pregnant with admissions that such was the fact. The answer denied that salaries were voted or allowed for the purpose of defrauding *the appellant or any other stockholder*, averred that during the year 1908 the plans adopted

by the respondents for operating and closing down the mill were fully known to the appellant; that the appellant's advice was constantly solicited; that the appellant made no complaint as to the mode of operating the mill or as to the competency of its officers, etc.

Again, the court misconstrued the purposes of Bal. Code, § 4261, upon which its ruling was based. It has almost universally been held that such statutory provisions are intended for the benefit and protection of the corporation and its creditors, and that the corporation may waive a compliance therewith. *Stewart v. Walla Walla Print. & Pub. Co.*, 1 Wash. 521, 20 Pac. 605; *Isham v. Buckingham*, 49 N. Y. 216; *Robinson v. Nat. Bank of New Berne*, 95 N. Y. 687; *Cecil Nat. Bank v. Watsontown Bank*, 105 U. S. 217, 26 L. Ed. 1039; *Just v. State Sav. Bank of Ionia*, 132 Mich. 600, 94 N. W. 200; *Horton v. Mercer*, 71 Fed. 153, 3 Clark & Marshall, Corporations, p. 1790; 2 Cook, Corporations, § 383; Morawetz, Private Corporations, § 222. Under the above authorities, and many more that might be cited, the respondents are estopped to deny that the appellant is a stockholder of the company, under the proofs and offer of proofs found in this record. This error calls for a reversal of the judgment, but in view of the new trial that must follow a reversal, we deem it necessary to discuss briefly the other errors assigned.

The ruling of the court excluding testimony under the complaint until the appellant first established the fact that he was a stockholder is assigned as error, but this assignment relates merely to the order of proof, a question resting very largely in the discretion of the court, and we perceive no abuse of discretion here. In any event the question cannot arise on a retrial.

This brings us to the sufficiency of the complaint to authorize the appointment of a receiver for any cause other than the voting of salaries to themselves by the officers of the respondent company.

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"The power of appointing a receiver is a discretionary one to be exercised with great circumspection, and only in cases where there is fraud, spoliation, or imminent danger of the loss of the property if the immediate possession should not be taken by the court; and such facts must be clearly proved. The policy of the law is to leave the affairs of corporate bodies to the management and control of their own chosen agents and that a minority of stockholders will not be permitted to displace corporate authority and control by substituting either for the policy, management and control of the courts, except in plain cases of such fraud or maladministration as works manifest oppression or wrong to them." Beach, *Receivers* (Alderson's ed.), § 424. *Secord v. Wheeler Gold Min. Co.*, 53 Wash. 620, 102 Pac. 654.

Within this rule, which is sustained by substantially all the authorities, we are not prepared to say that sufficient cause for the appointment of a receiver could not be made out under the allegations of this complaint, liberally construed, and the complaint must be so construed, especially where objection to the sufficiency of the complaint is first raised by objection to the introduction of testimony at the trial.

If it be true, as charged in the complaint, that the assets of the respondent company were of the value of \$27,000 at the beginning of the year 1908, that approximately one-third of its entire capital was lost and dissipated during that year through maladministration, incompetency and mismanagement; if it is about to lose its mill site of the value of from \$4,000 to \$5,000, and will suffer irreparable injury by being compelled to remove its mill to another site from similar causes; if the same mismanagement and incompetency is to characterize the operations of the mill during the year 1909, and if the majority stockholders have illegally voted salaries to themselves to pay for stock purchased to obtain and retain control of the company, it is manifest that the company is on the brink of insolvency, and that the appellant's interest in the company will be utterly dissipated and lost. Such mismanagement and maladministration on the part of majority

stockholders are not beyond the reach of a court of equity. Furthermore, the charge of illegally voting salaries, under which the court was willing to receive testimony, simply gives color to and accentuates the other charges of mismanagement and maladministration alleged in the complaint.

For these reasons we are of opinion that the appellant was entitled to offer evidence generally under the allegations of his complaint; and to that end the judgment is reversed and a new trial ordered.

PARKER, MOUNT, DUNBAR, and CROW, JJ., concur.

[No. 7860. Department One. July 12, 1909.]

JAMES T. WODDY *et al.*, *Appellants*, v. BENTON WATER
COMPANY *et al.*, *Respondents*.¹

VENDOR AND PURCHASER—REMEDIES OF VENDEE—DAMAGES—DEFICIENCY IN AREA—ACCEPTANCE OF DEED. A vendee can recover damages for a deficiency in the area of land conveyed, where the contract of purchase called for sixty acres of land out of a larger tract owned by the vendors, without other description; and mere acceptance of a deed conveying an irregular tract by metes and bounds does not bar a recovery, as the vendee could assume that it conveyed the quantity called for.

SAME—FRAUD OF VENDOR—FALSE REPRESENTATIONS—CAVEAT EMP-
TOR. The principal of *caveat emptor* does not apply, and it is error to grant a nonsuit in an action by a vendee for damages by reason of false representations, where it appears that the defendants represented that the sixty acres of land sold was so situated that it could all be irrigated by gravity from their canal; that over 28 acres was above the level of the canal and could not be so irrigated, which fact could only be ascertained by an accurate survey and was known to defendants, who had made the survey, and was unknown to the plaintiff; the modern tendency being to restrict the doctrine of *caveat emptor* which has no application if facts are peculiarly within the other party's knowledge, although not exclusively so; such representations being actionable or at least making a case for the jury.

¹Reported in 102 Pac. 1054.

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Appeal from a judgment of the superior court for Benton county, Zent, J., entered June 6, 1908, upon granting a nonsuit, after a trial before the court and a jury, in an action by a vendee to recover damages for fraud. Reversed.

C. O. Anderson, O. R. Holcomb, and C. L. Holcomb, for appellants.

Henry J. Snively, for respondents.

RUDKIN, C. J.—On the 3d day of November, 1906, the plaintiffs and the defendant The Benton Water Company entered into a written contract wherein the water company agreed to exchange sixty acres of land, with a perpetual water right for irrigation purposes, situate in Benton county, for one hundred and fourteen acres of farming lands situate in Whitman county. The lands of the plaintiffs were particularly described in the contract by references to the government surveys, but the only description given of the water company's lands was the following: "All that part of the Northeast quarter of section twenty-three, township nine, North range twenty-eight E. W. M., in Benton county, Washington, lying E of the county road as now laid out and S and against the canal, necessary to make 60 A. of land." On the 17th day of December, 1906, pursuant to this contract the water company purported to convey to the plaintiffs the 60 acres and the water right in Benton county, under the following description:

"Commencing at a point on the north line of Section Twenty-three Township nine North Range Twenty-eight EWM. 483 feet westerly from the Northeast corner of said section which corner is a stone marked X, thence running along said section line north $89^{\circ} 37'$ west 1035.00 feet, thence South $2^{\circ} 7'$ west 1645.5 feet, thence South $89^{\circ} 53'$ East 2194.65 feet, thence North $11^{\circ} 12'$ East 209.9 feet to the center of the Benton Water Company's lateral Number 3, thence along the center line of said lateral North $76^{\circ} 16'$ west 381.8 feet, thence south $80^{\circ} 40'$ West 208.10 feet, thence North $52^{\circ} 33'$ West 88.60 feet to the North line of lot one (1) Section

Twenty-four township Nine North Range twenty-eight EWM., thence along said North line North $89^{\circ} 28'$ west 33 feet, thence North $00^{\circ} 49'$ East 72.10 feet to center line of said lateral Number 3, thence along said center line North $22^{\circ} 37'$ West 150.25 feet, thence North $32^{\circ} 44'$ West 458.10 feet, thence North $15^{\circ} 49'$ West 332.4 feet, thence North $9^{\circ} 37'$ West 415.20 feet to place of beginning, excepting a strip for canal right of way purposes 20 feet wide, measured at right angles from the above center line of said lateral Number 3 containing sixty acres more or less;"

and the plaintiffs in turn conveyed the Whitman county property to the defendant Munsey at the instance of his co-defendants. This action was instituted to recover damages for false representations made by the defendants in the negotiations leading up to the contract of sale, both as to the quantity of land to be conveyed and the number of acres susceptible of irrigation from the water company's canal by gravity flow.

The complaint alleged, and the testimony on the part of the plaintiffs tended to show, that the defendants represented that the tract to be conveyed by the water company contained 60 acres in all, and that the 60 acres was so situated with relation to the water company's canal that the entire tract could be irrigated therefrom by gravity flow; that in fact the tract contained only 52.64 acres, and 28.24 acres of this was above the level of the canal and could not be irrigated therefrom; that before entering into the contract the plaintiff James T. Woody visited the land, accompanied by certain of the defendants, and viewed the premises in a general way; that the fact that portions of the land could not be irrigated from the canal could only be ascertained by an accurate survey; that the defendants had caused such survey to be made and knew that portions of the tract could not be irrigated from the canal, that this fact was unknown to the plaintiffs, etc.

At the close of that portion of the plaintiffs' testimony disclosing the circumstances under which the exchange of

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property was made, the court directed a nonsuit, and from the judgment of nonsuit this appeal is prosecuted. We are at a loss to know upon what theory the court denied a recovery for the deficiency in the quantity of land which the respondents agreed to convey in exchange for the lands conveyed by the appellants. If we should assume that a purchaser must at his peril ascertain the quantity of land in a given tract with fixed and definite boundaries, before entering into a contract of purchase, and this is an extreme view to take, it would not avail the respondents in this case, for here the contract of purchase called for sixty acres of land out of a larger tract, without other or further description, and the appellants had no means of measuring or otherwise ascertaining the quantity of land to be conveyed until the boundaries were fixed and defined in their deed. They had a right to assume that the quantity of land conveyed by the deed corresponded with the contract, and are not barred from a recovery for a deficiency by the mere acceptance of the deed. The respondents agreed to convey 60 acres of land, they breached their contract and the appellants are entitled to recover damages for the breach, regardless of oral representations made at the time of sale.

Nor can we agree with the court below that the doctrine of *caveat emptor* applies to the representations made by the respondents to the effect that the entire tract was under the level of the canal and susceptible of irrigation therefrom. Strong language has been used by this and other courts in defining the duties of purchasers from which it might be inferred that vendors have an unbridled license to lie and deceive, but such has never been the law, and the tendency of the more recent cases has been to restrict rather than extend the doctrine of *caveat emptor*. Thus in *Strand v. Griffith*, 97 Fed. 854, the court said:

"There is no rule of law which requires men in their business transactions to act upon the presumption that all men are knaves and liars, and which declares them guilty of negli-

gence, and refuses them redress, whenever they fail to act upon that presumption. The fraudulent vendor cannot escape from liability by asking the law to applaud his fraud and condemn his victim for his credulity. 'No rogue should enjoy his ill-gotten plunder for the simple reason that his victim is by chance a fool.' "

In *Noyes v. Belding*, 5 S. D. 603, 59 N. W. 1069, the court said:

"The unmistakable drift is towards the doctrine that the wrongdoer cannot shield himself from liability by asking the law to condemn the credulity of his victim."

See, also, *Watson v. Molden*, 10 Idaho 570, 79 Pac. 503, and cases there cited. In 14 Am. & Eng. Ency. Law (2d ed.), pp. 120, 121, the rule is thus stated:

"By the overwhelming weight of authority, ordinary prudence and diligence do not require a person to test the truth of representations made to him by another as of his own knowledge, and with the intention that they shall be acted upon, if the facts are peculiarly within the other party's knowledge or means of knowledge, though they are not exclusively so, and though the party to whom the representations are made may have an opportunity of ascertaining the truth for himself. By the weight of authority, and in reason the rule that a person who is voluntarily blind as to facts concerning which false representations are made cannot complain of the same, applies only where the parties have equal present opportunity and means to ascertain the truth at the time of the transaction, and does not apply merely because it is possible to ascertain the facts. Indeed, it has been held that a person is justified in relying on a representation made to him, in all cases where the representation is a positive statement of fact, and where an investigation would be required to discover the truth."

In *McMullen v. Rousseau*, 40 Wash. 497, 82 Pac. 883, this court said:

"The main contention of the appellants is that this case comes within the rule often announced by this court that, where the vendor and purchaser are dealing at arm's length, and where the subject-matter of the sale is at hand, the pur-

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chaser must protect himself and cannot rely upon representations made by the vendor. This rule is firmly established where the representations relate to the subject-matter of the sale which is at hand, or to other facts the truth of which may readily be ascertained by the exercise of ordinary care and prudence. But the converse of this rule is equally well established where the subject-matter of the sale is not at hand, so that the truth or falsity of the representations concerning it may be ascertained, or where the representations relate to facts within the knowledge of one of the parties, and the truth or falsity of such representations cannot be ascertained by the other party upon reasonable investigation or by the exercise of reasonable care and prudence. Such are the cases of *O'Connor v. Lighthizer*, 34 Wash. 152, 75 Pac. 643; *Mulholland v. Washington Match Co.*, 35 Wash. 315, 77 Pac. 497; *Stack v. Nolte*, 29 Wash. 188, 69 Pac. 753, and *Lawson v. Vernon*, 38 Wash. 422, 80 Pac. 559."

Within this rule we think the representations made by the respondents were actionable, or at least that it was a question for the jury to say whether the appellants acted with that degree of prudence and circumspection which would mark the conduct of a reasonably prudent man under like circumstances. All the cases agree that the purchaser may rely upon representations of the vendor where the property is at a distance, or where for any other reason the falsity of the representations are not readily ascertainable; and we think the representations as to location of the land in relation to the canal were of this class, or at least that the jury might have so found. For these reasons the court erred in granting the nonsuit, and the judgment is reversed with directions to award a new trial.

FULLERTON, GOSE, and MORRIS, JJ., concur.

CHADWICK, J., concurs in the result.

[No. 7961. Department One. July 12, 1909.]

H. S. FENDER, *Respondent*, v. S. D. McDONALD *et al.*,
Appellants.¹

APPEAL—PRESERVATION OF GROUNDS—EXCEPTIONS—NECESSITY. A judgment must be affirmed where the findings are not excepted to, if they are sufficient to sustain the judgment.

SAME—EXCEPTIONS TO FINDINGS—SUFFICIENCY. An exception to an order denying a motion for a new trial cannot be deemed an exception to findings of fact, within the meaning of Bal. Code, § 5052.

SAME. One general exception to findings of fact is not available for any purpose.

Appeal from a judgment of the superior court for Walla Walla county, Brents, J., entered January 12, 1909, upon findings in favor of the plaintiff, after a trial before the court without a jury, in consolidated actions to set aside fraudulent conveyances. Affirmed.

Rader & Barker, for appellants.

T. P. & C. C. Gose, for respondent.

RUDKIN, C. J.—On the 5th day of December, 1907, the plaintiff in these consolidated actions recovered judgment against S. D. McDonald in the sum of \$1,451.89, and \$13.45 costs of suit. An execution issued upon the judgment was returned *nulla bona*, and the present actions were thereupon instituted to set aside certain conveyances theretofore made by the defendant S. D. McDonald to his codefendants, and to subject the property thus conveyed to the satisfaction of the plaintiff's judgment, on the ground that such conveyances were made without consideration, and for the purpose of placing the property conveyed beyond the reach of the plaintiff and other creditors of the grantor. On the 12th day of January, 1909, a decree was entered in the consoli-

¹Reported in 102 Pac. 1026.

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dated actions according to the prayer of the complaints, the decree reciting:

"That on the 5th day of November, 1906, the defendant S. D. McDonald, being the owner in fee of the hereinafter described lands situate in this county, and being then indebted to the plaintiff, his assignor hereinafter mentioned and divers other persons, for the purpose of placing said lands beyond the reach of said plaintiff and said other creditors and of preventing him and them from collecting the said indebtedness and circumventing, cheating and defrauding him and them thereof, conveyed that certain portion thereof consisting of the southwest quarter of section 14 of township 10 north of range 36, east of the Willamette meridian, for the purported and pretended consideration of \$4,000, to the defendant Laura B. Washburn, then and until after the commencement of these actions known by her maiden name of Laura B. McDonald, and in her said maiden name; that, on the same day and with the like purpose, the said defendant, S. D. McDonald conveyed that certain other portion of his said lands consisting of the south half of the southeast quarter, the northeast quarter of the southeast quarter and the south half of the northwest quarter of the southeast quarter of said section, township and range, for the purported and pretended consideration of \$5,000, to the defendant Mary E. McDonald; that each of said conveyances was accepted by said defendants Laura B. Washburn, then Laura B. McDonald, and Mary E. McDonald respectively, with full knowledge of the aforesaid purpose and in order to aid the said defendant S. D. McDonald to accomplish the same, and with the secret understanding between them that the title of said lands should be held by them, as such grantees, respectively, in trust to the use of the said defendant S. D. McDonald; that after said conveyance was so made to said defendant Laura B. McDonald, now Laura B. Washburn, she borrowed of Baker & Baker the sum of \$1,625, securing said loan by a mortgage on said portion of said lands so conveyed to her, and paid said sum to creditors of said defendant S. D. McDonald at his request; that if any further consideration were given by either of said grantee defendants for said conveyances, the same, including said sum so borrowed, did not exceed one-half the amount of the purported and pretended consideration therefor nor one-half the value of said tracts

of land respectively, and, in each case, was grossly inadequate; that after the making of said conveyances as aforesaid and on the 5th day of December, 1907, said plaintiff, by the consideration of this court, in a certain action brought by him against said defendant S. D. McDonald, recovered judgment upon said indebtedness against the said defendant S. D. McDonald for the sum of \$1,585.34, including interest, costs and disbursements; that thereafter said plaintiff duly caused an execution to issue upon said judgment, which was placed in the hands of the sheriff of this county and which directed him to levy upon the property not exempt from execution of said S. D. McDonald, as such judgment debtor as aforesaid, and that said sheriff, before the commencement of these actions, duly made return thereon to the effect that said defendant and judgment debtor, S. D. McDonald, has no property subject to execution, and that in fact, he has no such property."

From this decree the present appeal is prosecuted.

The respondent has moved an affirmance of the judgment on the ground that no exceptions were taken or reserved to the findings of fact embodied in the decree. The sufficiency of these findings or recitals to support the judgment is not questioned, and if the findings were not excepted to the judgment must be affirmed. *In re Clifford*, 37 Wash. 460, 79 Pac. 1001, 107 Am. St. 819; *Poor v. Cudihee*, 37 Wash. 609, 79 Pac. 1105; *Hector v. Hector*, 51 Wash. 434, 99 Pac. 13.

The appellants contend that a motion for a new trial was interposed the day following the entry of the decree, and that the exception to the order denying this motion was a sufficient exception to the findings of fact. The exception referred to is in the following language: "To which rulings of the court the defendants duly and severally except." Bal. Code, § 5052 (P. C. § 669), provides that exceptions to the decision of a court or judge upon a cause or part of a cause, either legal or equitable, tried without a jury, may be taken by any party, either by stating to the judge, referee or commissioner when the report or decision is signed, that such party excepts to the same, specifying the part or parts

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excepted to (whereupon the judge, referee or commissioner, shall note the exception in the margin or at the foot of the report or decision); or by filing like written exceptions within five days after the filing of the report or decision, or, where the report or decision is signed subsequently to the hearing and in the absence of the party excepting, within five days after the service on such party of a copy of such report or decision or of written notice of the filing thereof. We do not think that an exception to an order denying a motion for a new trial can be deemed an exception to findings of fact under this statute, but in any event we have repeatedly held that a general exception such as is found in this record is not available for any purpose. *Hannegan v. Roth*, 12 Wash. 65, 40 Pac. 636; *Cook v. Tibbals*, 12 Wash. 207, 40 Pac. 935; *Moyer v. Van de Vanter*, 12 Wash. 377, 41 Pac. 60, 50 Am. St. 900, 29 L. R. A. 670; *Schoonover v. Condon*, 12 Wash. 475, 41 Pac. 195; *Irwin v. Olympia Water Works*, 12 Wash. 112, 40 Pac. 637; *Ballard v. Keane*, 13 Wash. 201, 43 Pac. 27; *Payette v. Willis*, 23 Wash. 299, 63 Pac. 254; *Smith v. Glenn*, 40 Wash. 262, 82 Pac. 605; *Horrell v. California etc. Ass'n.*, 40 Wash. 531, 82 Pac. 889; *Peters v. Lewis*, 33 Wash. 617, 74 Pac. 815; *Bringgold v. Bringgold*, 40 Wash. 121, 82 Pac. 179.

The judgment of the court below is therefore affirmed.

FULLERTON, GOSE, CHADWICK, and MORRIS, JJ., concur.

[No. 7965. Department One. July 12, 1909.]

Theresa Blebois De L'Archerie, *Appellant*, v.
A. E. Rutherford, *Respondent*.¹

BROKERS—FRAUD OF AGENT—PURCHASE AND RESALE OF PROPERTY—EVIDENCE—SUFFICIENCY. The evidence sufficiently shows that a real estate agent, taking property in his own name and deeding it to the plaintiff, his client, at an advanced price, purchased the property for the plaintiff in the first instance and was guilty of a fraud in concealing the advance in price, and findings to the contrary are erroneous, where it appears from the deposition of the vendor, a disinterested witness, whose testimony was clear, full, and circumstantial, that the agent informed her that he was buying for a French lady (the plaintiff) and not for himself, that such witness was corroborated by the plaintiff, that the agent did not pretend that he informed plaintiff he was selling her his own property, the relationship of the parties having been that of principal and agent for some time, the agent making various deals for the plaintiff and carrying plaintiff's money in bank in his own name.

SAME. It is a constructive fraud for a broker not to inform his principal that he was the owner of the property sold.

Appeal from a judgment of the superior court for King county, Morris, J., entered December 1, 1908, upon findings in favor of the defendant, in an action for fraud, after a trial before the court without a jury. Reversed.

Frank C. Park, for appellant.

William L. Waters, for respondent.

RUDKIN, C. J.—The plaintiff in this action is a school teacher and the defendant a dealer in real estate. About the month of July, 1906, the plaintiff arrived in the city of Seattle, bearing a letter of introduction to the defendant from a mutual friend in Chicago. Between July and November, 1906, the plaintiff purchased several pieces of property in the city of Seattle from or through the defendant, one of which at least was resold by the defendant on commission. Considerable sums of money belonging to the plaintiff were carried by the defendant in his private account, and he re-

¹Reported in 102 Pac. 1033.

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ceived and disbursed money for her from time to time without rendering any account or being called upon to account until early in January, 1907.

In the month of November, 1906, the plaintiff purchased from or through the defendant a tract of land on Capitol Hill in the city of Seattle for the consideration of \$5,700, the purchase price of which was paid as follows: \$2,500 by mortgage, \$2,606.25 from money belonging to the plaintiff in the hands of the defendant, and the balance of \$893.75 by a second mortgage on the property in favor of the defendant. The property in question was conveyed by Iola J. Herron and husband to the defendant under date of November 30, 1906, and by the defendant to the plaintiff under date of January 14, 1907, but it is conceded that the preliminary negotiations for the conveyance from the Herrons to the defendant, and from the defendant to the plaintiff, antedated their respective deeds by some considerable time. The consideration paid the Herrons by the defendant was \$5,000, while the consideration paid the defendant by the plaintiff was \$5,700. The plaintiff had no knowledge of and did not discover this difference in consideration until after the execution and delivery of her note and mortgage to the defendant, and the present action was thereupon instituted to cancel the note and mortgage on the ground of fraud. From a judgment in favor of the defendant, the present appeal is prosecuted.

It seems to be conceded that the relation of principal and agent subsisted between the respondent and the appellant at the time of the sales and conveyances in question. In any event, that relationship was clearly and unequivocally established by the testimony. The respondent purchased and sold property for the appellant, carried her money in bank in his own name, received and paid out money, signed contracts and receipts in her behalf, and represented her in various ways at various times.

The respondent contends that he purchased the property

from the Herrons on his own account, or on the account of J. G. Leslie & Co., with whom he was associated in business, and that the property was thereafter resold to the appellant. The appellant, on the other hand, contends that the property was purchased from the Herrons on her account, through the respondent as her agent, and that the taking of the title in the name of the respondent and the subsequent conveyance to her for \$700 in excess of the original contract price paid the Herrons was a fraud upon her rights. The contention of the appellant must be sustained. Mrs. Herron from whom the property was originally purchased was the only witness at the trial who was wholly disinterested in the result. She testified by deposition, and as to her at least this court occupies as favorable a position to weigh her testimony correctly as did the court below. Her testimony was clear, full and circumstantial. She testified positively that the respondent stated at their first interview that he was purchasing the property for a French lady (referring to the appellant), and that when the deed was afterward executed, in answer to the inquiry "The deed is in your name I see," the respondent replied, "Yes, I am having it made to myself, but I am buying it for another party." This witness was fully corroborated by the appellant, and by other testimony at the trial. While the respondent denied that he purchased the property for the appellant, he did not claim or pretend that he informed her that he was selling her his own property or property in which he had an interest. This of itself was a constructive fraud by reason of the relationship existing between the parties, but such fraud would give rise to a different form of action to be followed by a different kind of relief. The respondent did not deny except inferentially that he had told the appellant at the time she purchased the property that she must act quickly or the old lady who owned the property would back out; and upon the entire record we are convinced that the contention of the appellant is sustained by a clear preponderance of the testi-

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mony. The rights, duties, and obligations growing out of the relationship of principal and agent have been so often considered by this court that it seems scarcely necessary to refer to our former decisions. *Hindle v. Holcomb*, 34 Wash. 336, 75 Pac. 873; *Cantwell v. Nunn*, 45 Wash. 536, 88 Pac. 1023; *Merriman v. Thompson*, 48 Wash. 500, 93 Pac. 1075; *Jameson v. Kempton*, 52 Wash. 106, 100 Pac. 186.

The judgment is reversed with directions to cancel the note and mortgage described in the complaint, upon the payment into court by the appellant of the sum of \$193.75, with interest from date of the mortgage. If the mortgage cannot be surrendered or cancelled by reason of its negotiation to innocent parties, the court will give judgment against the respondent for the sum of \$700, with interest from the date of the mortgage, and for costs of suit.

FULLERTON, CHADWICK, and GOSE, JJ., concur.

MORRIS, J., took no part.

[No. 7982. Department One. July 12, 1909.]

SEATTLE LIGHTING COMPANY, *Respondent*, v.

H. W. HAWLEY, *Appellant*.¹

EXPLOSIVES—DANGEROUS WORK—ASSIGNMENT OF CONTRACT FOR STREET GRADING—LIABILITY FOR ACTS OF INDEPENDENT CONTRACTOR. The original contractor for the grading of a public street, who had assigned the contract to an independent contractor using his own methods free from control except as to the results obtained, is not liable for damages caused by a dynamite explosion in the prosecution of the work, where it is not shown that the use of dynamite was contemplated in the contract or customary in improvements of like character; since the grading of a street in such a case is not so inherently dangerous as to come within the exception to the rule of nonliability for the acts of independent contractors.

MUNICIPAL CORPORATIONS — IMPROVEMENTS — LIABILITY OF CONTRACTOR—ASSIGNMENT TO INDEPENDENT CONTRACTOR. After assignment of a contract for street improvements to an independent con-

¹Reported in 103 Pac. 6.

tractor, the original contractor is not liable for the negligence of the former causing damages to the private property of a gas company in the streets; since the duty owed the gas company is entirely different from that owed to the traveling public.

SAME—PROHIBITION OF ASSIGNMENT—EFFECT. That an assignment of a contract for street improvements is prohibited by the terms of the contract and by the city charter, does not affect the legal relations of the parties, or render the assignor liable for the acts of the assignee; since the prohibitions were intended for the benefit of the city.

SAME—TERMS OF CONTRACT. The fact that contractors for a street improvement agreed with the city to do the work at their own risk, does not render them liable for negligence of their assignees, if the city was not liable therefor.

Appeal from a judgment of the superior court for King county, Griffin, J., entered January 5, 1909, upon findings in favor of the plaintiff, in an action for damages to property from an explosion. Reversed.

James A. Snoddy, for appellant.

H. R. Clise and *C. K. Poe*, for respondent.

RUDKIN, C. J.—On the 8th day of February, 1907, the city of Seattle entered into a contract with Hawley & Lane to improve East Lake Avenue, from Almy street to Twelfth Avenue North, according to the plat on file in the office of the city engineer and the specifications and general stipulation attached to the contract. On the 19th day of March, 1907, Hawley & Lane assigned their contract with the city to Walter Webb, George Mead, and Neil McDonald. Under the terms of the original contract and under the terms of the assignment neither the city nor Hawley & Lane reserved any supervision over the work, except as to the results to be obtained, and the assignees of the contract became to all intents and purposes independent contractors. On the 21st day of November, 1907, the assignees of the contract exploded a charge of dynamite in the course of the work of grading and improving the street, causing injury to the gas main of the plaintiff company located within the street. This

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action was instituted against Hawley, one of the original contractors, to recover damages for the injury thus sustained; and from a judgment in favor of the plaintiff, the present appeal is prosecuted.

As already stated, the persons causing the injury were independent contractors; and, unless the case falls within some recognized exception to the general rule of nonliability of the employer in such cases, the judgment must be reversed. The general rule of law upon this subject is this: Where an individual or corporation contracts with another individual or corporation, exercising an independent employment, for the latter to do a work not in itself unlawful or attended by danger to others, such work to be done according to the contractor's own methods, and not subject to the employer's control or orders, except as to the results to be obtained, the employer is not liable for the wrongful or negligent acts of the contractor or of the contractor's servant. *Atlanta & Florida R. Co. v. Kimberly*, 87 Ga. 161, 27 Am. St. 231; *Norwalk Gaslight Co. v. Norwalk*, 63 Conn. 495, 28 Atl. 32; *Kendall v. Johnson*, 51 Wash. 477, 99 Pac. 310. The exceptions to the general rule are thus stated in *Kendall v. Johnson*, *supra*:

"Generally speaking, where the act which causes the injury is one which the contractor is employed to perform, and the injury results from the act of performance, and not from the manner of performance, or where the contractor is employed to do an act unlawful in itself, or where the injury is due to defective plans or methods pursuant to which the work is done, or where the work is inherently or intrinsically dangerous in itself and will necessarily or probably result in injury to third persons, unless measures are adopted by which such consequences may be prevented, and in other like cases, a party will not be permitted to evade responsibility by placing an independent contractor in charge of the work."

It cannot be said that the work contracted for in this case was unlawful in itself, or that the injury resulted from the act of performance and not the manner of performance, and

unless the work contracted for was inherently or intrinsically dangerous and would necessarily or probably result in injury to third persons, unless measures were adopted by which such consequences would be prevented, we think the general rule of nonliability should obtain. It certainly cannot be said with any show of reason that the work of grading or improving a street is inherently dangerous in so far as the particular injury here complained of is concerned. It was not shown that the use of dynamite in the performance of the contract was contemplated by the parties, nor that the use of such dangerous agencies was customary upon works of like character in the city of Seattle. In the absence of any showing that the use of dynamite or other explosives was within the contemplation of the parties, or was customary in making improvements of like character, we feel constrained to hold that the grading and improving of a street is not necessarily or inherently dangerous to gas pipes located within the street.

The respondent contends that the improvement of the street was a work of a public or quasi public nature, and that the appellant could not escape the high duty owed to the public by an assignment of his contract. This in a measure is true. The city of Seattle could not relieve itself of its duty to the public to keep its streets in a reasonably safe condition for public travel by placing an independent contractor in charge of its streets, nor could a contractor with the city evade the like duty through an assignment of his contract. But the duty the city and its contractors owe to the public, and the duty they owe to the gas company having pipes within the city streets are entirely different. There was nothing of a public nature in the duty the city owed to the gas company in this connection, and that fact clearly distinguishes this case from the case of *Water Co. v. Ware*, 16 Wall. 566, 21 L. Ed. 485, upon which the respondent chiefly relies. In the *Ware* case a traveler upon the public streets

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was injured because of a dangerous agency maintained in the street, while here the duty owed to the gas company was strictly private; namely, to so use one's own property as not to injure another.

The respondent further contends that the assignment of the contract was prohibited by both the city charter and the contract itself. Both these provisions were intended for the benefit of the city and did not and could not change the legal relations existing between the contractor and his assignees. Again, it is contended that the original contractors agreed with the city that the work should be performed at their risk, and that they assumed responsibility for all damages to the work or on the line of the work from any cause whatever. If the city were liable for the injury complained of, no doubt a recovery might be had against the appellant here to avoid a circuitry of actions; but the city is not liable for the same reasons that exempt the appellant from liability, and the rights of the parties are therefore not affected or controlled by this stipulation in the contract.

We are of opinion that the appellant is not liable in damages for the injury complained of, and the judgment is accordingly reversed, with directions to dismiss the action.

FULLERTON, CHADWICK, GOSE, and MORRIS, JJ., concur.

[No. 8060. Department One. July 12, 1909.]

THE STATE OF WASHINGTON, *Respondent*, v. STERLING HALL,
Appellant.¹

INDICTMENT AND INFORMATION—STATUTORY LANGUAGE—ROBBERY. An information in the language of the statute is not sufficient in charging the crime of robbery or larceny from the person.

ROBBERY—INFORMATION—ALLEGING RIGHT TO PROPERTY—SUFFICIENCY. An information for robbery charging the forcibly taking of the property of A from the immediate presence of B, without showing any connection between A and B or the right of B to control and dominion over the property, is insufficient to sustain a conviction.

CRIMINAL LAW—APPEAL—AIDER BY VERDICT. The doctrine of aider by verdict does not apply in a criminal case where the information was insufficient to sustain a conviction.

CRIMINAL LAW—APPEAL—DECISION—EFFECT. Upon reversal of a conviction for robbery because the information failed to allege the right of the person robbed to control and dominion over the property taken, the accused is not entitled to a discharge, but the case will be remanded for further proceedings.

Appeal from a judgment of the superior court for Adams county, Holcomb, J., entered February 20, 1909, upon a trial and conviction of robbery. Reversed.

W. W. Zent, for appellant.

John Truax, for respondent.

RUDKIN, C. J.—This is an appeal from a conviction of the crime of robbery under the following information:

“That the said Sterling Hall in the County of Adams, in the State of Washington, on or about the sixteenth day of October, one thousand nine hundred eight, then and there being, did then and there unlawfully, wilfully, forcibly, feloniously and by violence and putting in fear one G. E. Parsons, did then and there forcibly and feloniously take from the immediate presence of said G. E. Parsons certain articles of value, to wit: Twenty Dollars in lawful money of the United

¹Reported in 102 Pac. 888.

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States of America, the same being of the value of Twenty Dollars in lawful money of the United States of America and the same being the personal property and goods of another, to wit: The Spokane Merchants' Association, of Spokane, Washington, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Washington."

The sufficiency of the information is the only question presented for the consideration of this court. The appellant contends that the information is defective because it failed to allege that the property taken was in the possession of the prosecuting witness at the time of the alleged robbery. The respondent, on the other hand, contends that the information is in the language of the statute and is therefore sufficient, citing many cases to sustain that well-established general rule. There are many exceptions, however, to that general rule, and this court has held that the crime of robbery and the crime of larceny from the person fall within the exceptions, and not within the general rule. *State v. Dengel*, 24 Wash. 49, 63 Pac. 1104; *State v. Morgan*, 31 Wash. 226, 71 Pac. 723. In the *Dengel* case it was said that the defendant might have committed every act charged in the information, and yet not be guilty of the crime of robbery, because ownership of the property taken was not alleged in some person other than the defendant. In the case at bar the information does allege title to the property in a person other than the appellant, but title was not alleged in the person robbed, nor is any connection shown or alleged between the person robbed and the property taken. The information simply charged that the property of the Spokane Merchants' Association of Spokane was taken by the appellant from the immediate presence of G. E. Parsons.

As we understand the law, to constitute the crime of robbery the property must be taken from the person of the owner, or from his immediate presence, or from some person, or from the immediate presence of some person, having control and

dominion over it. For instance, if A takes the property of B from the immediate presence of C, by force or putting in fear, A is not guilty of the crime of robbery unless C had control and dominion over B's property at the time of the taking. For this reason the information is in our opinion defective and will not support a conviction. It was so held in *People v. Ho Sing*, 6 Cal. App. 752, 93 Pac. 204. The California statute there construed defines the crime of robbery as "The feloniously taking of personal property in the possession of another, from his person or immediate presence and against his will accompanied by means of force or fear." Our statute does not contain the words *in the possession of another*, but we think that control and dominion over the property taken in the person from whom or from whose presence the property is actually taken are necessarily implied. In *State v. Lawler*, 130 Mo. 366, 32 S. W. 979, 51 Am. St. 575, it was held that an indictment for robbery must charge the ownership of the property in the person alleged to have been robbed, and that it is not sufficient to allege ownership in one person and a taking in the presence of and against the will of another.

The respondent contends that any defect in the information in this regard was cured by the verdict, but the rule of *aider* by verdict has little or no application to criminal cases. The appellant on the other hand contends that he is entitled to his discharge upon a reversal of the judgment, but this contention is without merit. *State v. Riley*, 36 Wash. 44, 78 Pac. 1001; *State v. Burns*, *ante* p. 113, 102 Pac. 886.

We are of opinion that the court erred in denying the motion in arrest of judgment, and for that error the judgment is reversed and the cause is remanded for further proceedings.

FULLERTON, MORRIS, CHADWICK, and GOSE, JJ., concur.

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[No. 7957. Department One. July 12, 1909.]

GEORGE W. RHOADES, *Appellant*, v. C. O. BARNES,
Respondent.¹

LICENSES—PAROL—REVOCATION—FRAUDS, STATUTE OF. A parol license to be exercised on the land of another creates an interest in land, is within the statute of frauds, and may be revoked by the licensor irrespective of performance and expenditures by the licensee.

WATERS AND WATER COURSES—PRESCRIPTION—ADVERSE USER. No prescriptive right is acquired under a permission to use water by tapping a water company's line on the lands of a third person, the user paying therefor by keeping a dam in repair; since the user of the water was not a proprietor, and the use was permissive and not hostile.

SAME—LAPSE OF TIME—INTERRUPTION OF USER. The initiation in 1898 of a prescriptive right to take water from a pipe on the lands of another, is prevented from ripening by the acts of the owner in 1905, claiming the water and stopping the flow.

SAME—GRANTS—RESTRICTIONS. A grant by a water company to erect a dam and take water through a four and one-half inch pipe at any point in a creek across the grantor's lands, does not authorize the use of an eight-inch pipe, nor a change in the location of the dam after several year's use, the grantee being bound by its first location.

ESTOPPEL—MATTER IN PAYS. The use of water under a parol license, which was revoked before any prescriptive rights could ripen, does not obtain rights in the realty by estoppel *in pays*.

Appeal from a judgment of the superior court for Klickitat county, McCredie, J., entered April 14, 1908, upon findings in favor of the defendant, in an action for an injunction, after a trial before the court without a jury. Affirmed.

E. C. Ward, N. L. Ward, and W. B. Presby, for appellant.

Brooks & Smith and Wm. T. Darch, for respondent.

MORRIS, J.—The parties hereto are the owners of adjoining lands in Klickitat county, near Goldendale. Across the

¹Reported in 102 Pac. 884.

respondent's land flows a small creek, known as Klickitat creek. In 1883 the Goldendale Water Ditch Company commenced taking water from the creek and furnishing it to the town for domestic uses. This taking was at a point south of respondent's lands. In 1887, the supply being insufficient, a writing was obtained, signed by seven-twelfths of the then ownership of the respondent's land, which purported to grant to the company the exclusive right of way across the land to lay a four and one-half inch pipe, and to take water from the creek at any point to be selected by the company. Under this writing the company built a small dam and laid a pipe line across the lands, conveying the water to Goldendale, where it was sold for domestic use. In 1890, more head being required, the location of the dam was changed to a point higher up the creek, and an eight-inch pipe laid across the lands. In 1895 appellant obtained from the then owners of the pipe line permission to take water from this eight-inch pipe, tapping it at a point where it crossed a corner of his lands.

The company continued to use this pipe line to supply the inhabitants of Goldendale until about the year 1896, when a new supply was obtained from another source. At about the same time the old pipe line was abandoned, no use being made of it by the people of Goldendale, with the exception of a Mr. Young, one of the original owners, who seems to have made some use of it for irrigating his orchard. The permission given appellant to tap this line was in consideration of his keeping the dam in repair, the dam being only a temporary affair consisting of a fourteen inch log thrown across the creek with dirt and straw placed against it. Appellant continued using the water from this tap about three years, when he obtained a second permission to tap the pipe about three hundred feet from the first tap, with a two-inch pipe. One Hornibrook was then the owner of respondent's lands, and he gave appellant permission to cross the lands with this two-inch pipe, about the distance of three hun-

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dred feet from the point where the new tap was made, until appellant reached his own lands. Hornibrook also used water from this dam for irrigating purposes, under the same condition of its use by appellant, viz., keeping the dam and pipe line in repair; and under this condition the dam was kept up.

In 1901 respondent became the owner of the land previously occupied by Hornibrook, and from the time of his ownership he seems to have assisted in maintaining the dam, which was removed each winter during the time of high water in the creek and replaced again in the spring, appellant obtaining permission from respondent to replace the dam in 1901, and the lower court finding that, whatever was done upon the dam subsequent to that year, was by permission and consent of respondent. Under this arrangement the dam was maintained each season, until in July, 1905, when the respondent, claiming there was not sufficient water for the use of himself and appellant, stopped the flow through appellant's pipe; and after a third stoppage of the water, appellant brought this action to obtain injunctive relief; which being denied by the court below, he appeals.

Appellant contends that, the company having given him the rights to take water from its pipe upon condition of his keeping the dam in repair, such right became a license, and being coupled with a performed condition, it became and is irrevocable; and cites many cases holding that a parol license made upon condition, when the condition is performed by the licensee, or expenses incurred by him, becomes irrevocable. It must be admitted that many cases so hold; but this court, in the case of *Hathaway v. Yakima Water L. & R. Co.*, 14 Wash. 469, 44 Pac. 896, 53 Am. St. 847, in reviewing such a rule, refused to adopt it, holding then, as we do now, that a parol license to be exercised upon the land of another creates an interest in land, is within the statute of frauds, and may be revoked by the licensor at any time, irre-

spective of the performance of acts under the license, or the expenditure of money in reliance thereon. This case and the authorities there cited dispose of this contention.

It is next contended that, the water company having transferred its right to the water and the dam to appellant, these respective possessions may be attacked for the purpose of forming a prescriptive right. Appellant's evidence shows his use of the water to have been under his permission from the water company, paying for such use by the repairs to the dam. This use was not that of a proprietor, nor was he claiming adversely to any one. To gain a prescriptive right, the enjoyment of the right must be that of a proprietor. It must also be adverse and not permissive. Farnham, Waters, § 809. No prescriptive right can initiate in a recognition of title in another. The water company recognized the title of respondent's grantors, and claimed its right to maintain the dam, either under the original grant to erect the dam, or under a permissive right to change and construct it at the last location. There is no evidence of any hostile holding on the part of the water company, and, without such hostile holding, both in the inception and continuance of the claimed right, there would be no prescription. Neither does appellant claim to be hostile to any one, his entire claim being based upon the right given him by the water company, for which he met the consideration required. Further, appellant could not have claimed under any original right to use the water given him by the first owners of the company, for the reason that subsequent to Hess' control of the company, he obtained permission from him. Neither was there a sufficient lapse of time in which to ripen a prescriptive right. From 1895 to 1898 he used the water under his permission from the water company. In 1898 he obtained Hornibrook's permission to lay pipes across these lands and take from the dam three hundred feet away from the first diversion. So that, if it could be held that this last diversion initiated a

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prescriptive right, the acts of the respondent disturbed it long before it had ripened.

Assuming, but not so holding, that the written instrument, signed by seven-twelfths of the French heirs, was a grant to the water company to lay a four and one-half inch pipe from any point on Klickitat creek across the French lands, the company continued to take water at the initial point under this grant only for about three years, when they moved the point of diversion half a mile up stream and built a new dam, from which they laid an eight-inch pipe, abandoning the first dam. The second location could not be justified under the grant. The right to erect a dam and lay a four and one-half-inch pipe therefrom did not convey a right to change such dam at will, nor to lay an eight-inch pipe across any portion of the lands the company might desire. Having made its first location under its grant, the water company was bound thereby, and had no right to go where it would and lay any pipe it saw fit across any desired part of the land. *McCue v. Bellingham Bay Water Co.*, 5 Wash. 156, 31 Pac. 461:

“Where an easement in land is granted in general terms, without giving definite location and description to it, so that the part of the land over which the right is to be exercised cannot be definitely ascertained, the grantee does not thereby acquire a right to use the servient estate without limitation as to the place or mode in which the easement is to be enjoyed, when the right granted has been once exercised in a fixed and defined course, with the full acquiescence and consent of both parties, it cannot be changed at the pleasure of the grantee.” *Jennison v. Walker*, 11 Gray 423.

To the same effect is *Onthank v. Lake Shore etc. R. Co.*, 71 N. Y. 94, 27 Am. Rep. 35, where, in a grant to lay water pipe across grantor's lands without specifying the place or size of the pipe, it was held that, “after the grantee had once laid its pipe and thus selected the place where it would exercise its easement thus granted in general terms, what was before

indefinite and general became fixed and certain," and this both as to the location and size of the pipe.

Appellant invokes the doctrine of estoppel. While it is true that rights in real estate may be obtained and irrevocably fixed and determined by matter *in pais*, there are no facts in this case which can be relied upon for the establishment of such a rule. Other questions are suggested by appellant, but they have all been disposed of by what has been said.

Finding no error, the judgment is affirmed.

RUDKIN, C. J., CHADWICK, FULLERTON, and GOSE, JJ.,
concur.

[No. 8171. Department One. July 12, 1909.]

THE STATE OF WASHINGTON, *on the Relation of W. S.*
Bennett et al., Plaintiff, v. EDWARD W. TAYLOR
*et al., Respondents.*¹

PROHIBITION—JURISDICTION—EFFECT OF STIPULATION. Under Const., art. 4, § 4, and Bal. Code, § 5769, the supreme court has power to issue a writ of prohibition only to restrain the exercise of an unauthorized judicial or quasi judicial act, notwithstanding a stipulation of the parties to the application limiting the inquiry to the constitutionality of a specified statute.

SAME—GROUNDS—NONJUDICIAL ACT OF SUPERIOR JUDGE—APPOINTMENT OF WATER COMMISSIONER. Laws 1907, p. 285, § 1, authorizing the superior court, upon an *ex parte* application of the owner or manager of an irrigation reservoir for the storage of waters, to appoint a water commissioner to control and regulate the head gates in accordance with court decrees or the legal rights of interested owners, prescribes only ministerial or administrative duties, and not judicial or quasi judicial duties, and has no relation to judicial proceedings, where removal was the only power that the court could exercise over him; hence the supreme court has no jurisdiction to prevent the appointment by writ of prohibition.

Application for a writ of prohibition filed in the supreme court July 6, 1909, to prevent the appointment of a water

¹Reported in 102 Pac. 1029.

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commissioner by the superior court of Okanogan county, Taylor, J. Writ denied.

P. D. Smith and *E. K. Pendergast*, for relators.

Ralph B. Williamson, for respondent.

Gose, J.—On the 5th day of June, 1909, one Fred Bonstedt, as manager in charge of the Okanogan Irrigation Project of the United States, filed a notice in the superior court of Okanogan county, stating that his principal, the United States, had constructed a reservoir for the storage of the water of Salmon creek, in Okanogan county, for the purpose of irrigating a large body of land, and that it desired to use the bed of Salmon creek for the purpose of carrying the water from the reservoir to the place where it would be used. The notice further stated that, on June 7, following, he would, on behalf of his principal, apply to the court for the appointment of a commissioner to control, regulate, distribute, and measure the water.

The relators, taxpayers, and owners of a part of the natural flow of the water of Salmon creek, have applied to this court for an alternative writ of prohibition against the respondent, as judge of the superior court and court commissioner respectively, and have alleged that the respondents would appoint a commissioner as prayed for unless prohibited by this court. The hearing on the notice for the appointment of a commissioner was continued until July 16. The respondent Woodbeck stipulated that the facts alleged in the petition for the writ are true, and that he consented to this court limiting its inquiry to the single question of the constitutionality of the act under which the appointment of the water commissioner is sought. Respondent Taylor demurred to the petition for the writ, on two grounds; (1) that the court has no jurisdiction over the subject-matter of the cause, as the act sought to be prohibited is ministerial and administrative and not judicial; (2) that the petition

does not state facts sufficient to warrant the issuance of any extraordinary writ.

Notwithstanding the stipulation of one of the respondents, our first duty is to inquire as to our power to grant the writ. The only office of the writ of prohibition, under art. 4, § 4, of the constitution, and the code (Bal. Code, § 5769; P. C. § 1422) is to restrain the exercise of an unauthorized judicial or *quasi* judicial act. *Winsor v. Bridges*, 24 Wash. 540, 64 Pac. 780; *State ex rel. Pelton v. Ross*, 39 Wash. 399, 81 Pac. 865.

It therefore becomes pertinent to inquire whether the power conferred upon the superior court is a judicial one. The questions involved necessitate a consideration of the act under the terms of which the appointment of a water commissioner was requested. It is urged by the respondents that the power to make the appointment is contained in Laws 1907, page 285, chap. 144. Section 1 of the act is as follows:

"That whenever the owner, manager or lessee of a reservoir, constructed for the storage of water to be used for beneficial purposes, shall desire to use the bed of any stream, or other natural water course, for the purpose of carrying stored, or impounded water, from the reservoir to the user thereof, he shall, in writing, notify the superior court of any county within which said water is stored, carried or used, giving the date when it is proposed to discharge water from such reservoir, and the names of all persons and ditches entitled to its use. The court may then upon a proper showing as to the necessity therefor, appoint a commissioner with qualifications as hereinafter stated, whose duty it shall be to so close, regulate or adjust the head gates of the several ditches taking water from such stream or natural water course, that no more water will flow into said ditch than it is entitled to receive from the water stored in the reservoir or from the unregulated flow of the streams or from both, as determined by decrees of court or as shown by evidences of right properly recorded or by agreement between the parties in interest made with due regard to the legal rights of all, and any person who may be injured by the action of

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said commissioner, or by his failure to act as herein provided, may resort to any court of competent jurisdiction for such relief as he may be entitled to."

Section 4 provides:

"Said commissioner may, with the consent of the superior court appointing him, have power to employ and appoint assistants to aid him in the discharge of his duties whenever necessary. . . ."

The relators assert that the act is violative of § 5, art. 11, §§ 3 and 16, art. 1, of our constitution, and of the fourteenth amendment of the Federal constitution. The act under consideration does not require that any notice shall be given preceding the appointment of a commissioner. The only conditions precedent to the appointments are, (1) that the court shall be notified in writing that the owner, manager, or lessee of a reservoir constructed for the storage of water to be applied to a beneficial use, desires to use the bed of a stream for the purpose of carrying impounded water from the reservoir to the place of use; (2) the court may, upon the proper showing of necessity, appoint a commissioner possessing theoretical and practical knowledge of the science of hydraulics. The proceeding is purely an *ex parte* one and bears no relation to a judicial inquiry. The relators state that "the view of the superior court that this is a judicial proceeding is not justified by the wording of the act." This view is concurred in by the respondent Taylor, and our own investigation has led to a like conclusion. The fact that the relators may have been led into making this statement in the haste of the preparation of their application for a writ has led us to make an independent investigation of the law pertaining to the capacity in which the superior court is called upon to act in the appointment of a commissioner.

In *Supervisors of Election*, 114 Mass. 247, 19 Am. Rep. 341, the court was considering the validity of a statute vesting the supreme judicial court with power, with or without notice, to appoint supervisors of election. Speaking to the

character of the power exercised, at page 251, the court, through Mr. Chief Justice Gray, said:

"These supervisors, although entrusted with certain discretion in the performance of their duties, are strictly executive officers. They make no report or return to the court or to any judge thereof. Their duties relate to no judicial suit or proceeding, but solely to the exercise by the citizens of political rights and privileges. We are unanimously of the opinion that the power of appointing such officers cannot be conferred upon the justice of this court without violating the constitution of the commonwealth. We cannot exercise this power as judges, because it is not a judicial function."

In *Board of Commissioners of Jackson County v. State*, 147 Ind. 476, 46 N. E. 908, the court was considering the validity of an act relating to the removal of a county seat. The act provided that a site for a court house and jail, together with the plans and specifications for such court house and jail, should be submitted to the judge of the circuit court, to be approved by him if he found the same satisfactory, such approval to be shown by an entry in the records of the circuit court either in term time or vacation. Speaking to the effect of this provision, at page 492, it is said:

"It is true that these provisions designate certain duties which the judge of the circuit court is authorized to perform, which partake more of a ministerial than a judicial nature."

In *McCall v. Calhoun*, 146 Mich. 319, 109 N. W. 601, the court had under consideration the validity of an act which provided that the place for holding court and the location of the jail, together with the sufficiency of the vault and safe to be used, should be inspected and approved in writing by the judge of the court or the prosecuting attorney of the county. Speaking to the question of the capacity in which the judge acted in the execution of this duty, at page 604, it is said:

"The authority of inspection and approval given to the circuit judge was not legislative, but while it was, in its na-

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ture, more ministerial than judicial, it was such a power as could be granted to and exercised by him."

In *Williamson v. Mingo County Court*, 56 W. Va. 38, 48 S. E. 835, it was held that the appointment of commissioners of election by the county court is not a judicial or *quasi* judicial act. The view that the power exercised under the act is not a judicial one is supported by the reasoning in *State v. George*, 22 Ore. 142, 29 Pac. 356, 29 Am. St. 586. We find numerous powers conferred upon superior court judges by our statute, which are in no sense judicial. The code (Bal. Code, § 4469; P. C. § 6263), empowers superior judges to solemnize marriages. They also have the power to take acknowledgments (Bal. Code, § 4702; P. C. § 4300), and to certify the oath of the county auditor taken by him as a member of the board of canvassers of election (Bal. Code, § 1417; P. C. § 4842).

If the power invoked bore any relation to any action or proceeding of the court where judicial functions were exercised, a different question would be presented. If the act is within the constitutional powers of the legislature (a question which we do not decide), it could have named some person as its agent to execute the terms of the law, or it could have named the board of county commissioners or some private individual to make the appointment. The act provides that the commissioner shall report both to the board of county commissioners and to the court appointing him. He is paid, however, by the board of commissioners. The single power which the court exercises over him is that of removal. Neither the court nor the judge thereof is given any supervisory power. The water commissioner is in no sense an officer of the court, but is rather the agent of the users of the water. Whether the exercise of the appointing power under the act is administrative or ministerial is not necessary to be decided.

It not being a judicial or *quasi* judicial act, we are with-

out jurisdiction. We must, therefore, decline to pass upon the constitutional questions sought to be raised.

The writ will be denied.

RUDKIN, C. J., FULLERTON, CHADWICK, and MORRIS, JJ.,
concur.

[No. 8031. Department One. July 14, 1909.]

STANLEY PINICKNEFF, *Respondent*, v. C. J. JOHNSON,
Appellant.¹

CONTRACTS—PERFORMANCE—CERTIFICATE OF ENGINEER—CONCLUSIVENESS. Where a railroad grading contract made two prices, one for the excavation of solid rock and one for the excavation of loose rock, under supervision by the company's engineers, and made the chief engineer's certificate final and conclusive as to the "quantities of the various kinds of work done," and an engineer's certificate, made advisedly and under direction from the chief engineer, included the excavation of "hard pan" as part of the "solid rock," a subcontractor is entitled to pay for the same from the principal contractor on the basis of payment for "solid rock"; as the contractor would recover pay from the company on the same basis.

CONTRACTS—BREACH—EVIDENCE—SUFFICIENCY. A finding that a railroad contractor breached his contract with a subcontractor by ordering him to cease work is sustained by the evidence, where the subcontractor testified that the contractor's foreman ordered him to cease, and a letter from the contractor shortly after states that if he had been on the ground in place of the foreman the subcontractor would not have had a chance as long as he did have.

Appeal from a judgment of the superior court for King county, Albertson, J., entered November 21, 1908, upon findings in favor of the plaintiff, in an action on contract, after a trial before the court without a jury. Affirmed.

George E. de Steiguer, for appellant.

O. A. Tucker, Alfred E. Parker, and S. G. Murray, for respondent.

¹Reported in 102 Pac. 1047.

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Opinion Per Gose, J.

Gose, J.—The appellant, having a grading contract with the Chicago, Milwaukee & St. Paul Railroad Company, on July 15, 1907, entered into a written contract with the respondent, the applicable part of which is in the following language:

“King County, July 15, '07.

“Mr. C. J. Johnson, Easton, Wn.

“Dear Sir: Having read the specification, I, the undersigned propose to do the work of grading between stations 173 to stations 193 on the West Hugh Line of the Chicago, Milwaukee and St. Paul Ry. Company's road according to said company's specifications and under the supervision of their engineers at the following prices:

“Solid rock, 85c per cubic yard;

“Loose rock, 35c per cubic yard . . .”

Before the completion of his contract, the respondent commenced this action, claiming that it had been breached by the appellant. The complaint stated four causes of action. The first cause of action averred the performance of certain work on the contract, that a part of the consideration had not been paid, and that before the completion of the contract the appellant ordered the respondent to cease work. The second cause of action averred that there was a subsequent oral contract entered into between the appellant and the respondent, whereby the former agreed to pay the latter a fixed price for moving hard pan, and that a part of the consideration therefor had not been paid. The third cause of action averred that the respondent had performed certain work outside of the contract at the request of the appellant, for which payment had not been made. The fourth cause of action averred that the respondent constructed a wagon road and trail for the purpose of carrying men and material to the work, and placed certain cars and material upon the line of grading to be used in carrying out his contract, that the appellant breached the contract and deprived the respondent of the use and benefit of the items mentioned, and that the respondent had not been

paid therefor. The answer denied that there was any sum due the respondent, and affirmatively alleged that the respondent had breached the contract. The specifications of the Chicago, Milwaukee & St. Paul Railroad Company were made a part of the answer. Section 30 of the specifications provides:

"The first party [meaning the company], in consideration of the fulfillment and performance of all the requirements and stipulations of this contract, and when the work shall have been in the opinion of the chief engineer completely performed and the chief engineer shall have furnished to the first party a certificate of the quantities of the various kinds of work done, which estimate shall be final and conclusive between the parties hereto, will pay to the contractor within _____ days after said certificate and estimate shall have been furnished by the chief engineer the sum which may be due under this contract agreeably to said estimates."

The case was tried to the court, resulting in a judgment for the respondent. This appeal has been taken from such judgment. The court made the following finding:

"That from the time plaintiff commenced work under said contract, to December 13, 1907, he removed the following:

"18878 cu. yds. solid rock at 85c....\$11,796.30

"2721 cu. yds. loose rock at 35c.... 952.35

"5214 cu. yds. hard pan at 35c..... 1,824.90."

It refused to make the following finding requested by the appellant:

"That on or before the 27th day of November, 1907, the plaintiff failed and refused to prosecute his said contract referred to in the complaint in accordance therewith or with reasonable diligence, expedition or skill."

The appellant assigns error upon the finding made, and upon the refusal of the court to make the requested finding.

The first point urged is that the court erred in classifying five thousand eight hundred and eleven yards of hard pan as solid rock. We have seen that the respondent engaged to grade according to the company's "specifications," and un-

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der the "supervision of their engineers;" that one of the specifications was that the chief engineer should furnish "a certificate of quantities of the various kinds of work done, which estimate shall be final and conclusive." Before the commencement of the action the company's engineer, under the direction of the chief engineer, had certified that the five thousand eight hundred and eleven cubic yards was solid rock. This amount is included in the thirteen thousand eight hundred and seventy-eight cubic yards of solid rock mentioned in the court's finding.

The company's engineers testified that the thirteen thousand eight hundred and seventy-eight yards of solid rock "includes the material, of course, that was classified as solid rock, and not actually solid rock," and that the "chief engineer instructed to allow these proportions" of hard pan and solid rock. They further stated that the purpose of the classification was to encourage the contractors to hasten, and to insure the performance of the contract. The evidence showed that the appellant had entered upon his books the disputed item of five thousand eight hundred and eleven yards as solid rock. Under the contract the respondent was to receive eight-five cents a yard for solid rock, and thirty-five cents a yard for hard pan. It is urged that the specification which we have quoted was denied by the reply, and was not offered or admitted in evidence. Whilst this statement is true, it is unavailing to the appellant. The specification may at least be accepted as his admission as to its provisions. Reading the contract and the specification together, it is clear that the respondent was entitled to recover on the basis of the engineer's certificate made advisedly and under the directions of the chief engineer. He will not be held to the burdens and denied the benefits of the specifications. The authorities cited by the appellant are not in point. They state the familiar rule that the certificate of the engineer is not conclusive when he has been guilty of fraud, misconduct, or such gross mistake as would imply

bad faith or a failure to exercise an honest judgment. Each of these elements is not only absent in the instant case, but on the contrary it affirmatively appears that the estimate was made advisedly under the direction of the officer whose duty it was under the contract to certify the quantities of the various kinds of work done. It is clear that the appellant will be allowed compensation for the disputed item as solid rock. It would be a gross injustice, and a perversion of the law as well, to apply a different rule to the respondent. *Cummings v. Bradford*, 15 Ky. Law 155, 22 S. W. 548.

It is next urged that the respondent did not do his work according to the contract, and that the contract was actually breached by him. The learned trial court took a different view of the evidence. It did not make a direct finding as to who breached the contract; but, as we have seen, it refused to find that the respondent did not do the work according to the contract. It found that the respondent was entitled to recover compensation for certain work performed by him, and pleaded in the fourth cause of action. This compensation we have seen arose out of the appellant's breach of the contract. It is therefore clearly deducible from the findings that it was the opinion of the trial court that the contract had been breached by the appellant. There was abundant warrant in the testimony to support this view. The respondent testified that the appellant's foreman ordered him to cease work, and told him that he intended to close the camp. Whilst this is denied by the foreman, the persuasiveness of his testimony was largely diminished by his statement under oath that he was in the habit of telling the truth "when I think it is necessary." The respondent's testimony was strengthened by the statement of the appellant. Under date of December 3, 1907, he wrote the respondent a letter, wherein he stated:

"Your letter received and carefully noted. . . . If I had been up there in place of Mr. Yaw [the appellant's fore-

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man] you would not have had the chance as long as you did have."

This letter was written shortly after the respondent ceased to work under his contract. It appears from the evidence that the appellant was dissatisfied with the manner in which the respondent was doing the work, and that he ordered him to discontinue.

The judgment is therefore amply sustained by competent testimony, and it will be affirmed.

RUDKIN, C. J., FULLERTON, CHADWICK, and MORRIS, JJ.,
CONCUR.

[No. 7859. Department One. July 14, 1909.]

T. A. HANSARD, *Appellant*, v. JOHN F. GREEN *et al.*,
Respondents.¹

MUNICIPAL CORPORATIONS—CONTRACTS—CREATING INDEBTEDNESS—ISSUANCE OF BONDS IN PAYMENT OF UNAUTHORIZED CONTRACT. Under Bal. Code, § 1077, requiring a town to sell bonds issued for the purpose of purchasing water works, as deemed for the best interests of the town, the town has no authority to issue bonds and deliver them to bankers who advanced the money to purchase the water works at the special instance and request of the town.

SAME—ACQUISITION OF WATER WORKS—SUBMISSION TO VOTE—ORDINANCE—REQUISITES. An ordinance submitting to a vote of the people a proposed acquisition of water works by a town, is insufficient in that it fails to submit the "system or plan" proposed, as required by statute, where it merely recites the advisability of the purchase and the issuance of bonds to pay for the same, without setting out the matters proper to be considered respecting the time the bonds are to run, rate of interest, etc., including a method for the payment of the bonds.

SAME—ACTIONS—PLEADING—INTERVENTION—PARTIES ENTITLED. In an action against a town to enjoin the issuance of bonds in payment of a contract made by the town without authority of law, in which the town defaults, the contractors cannot be allowed to intervene and obtain the benefit of performance of the contract.

¹Reported in 103 Pac. 40.

Appeal from a judgment of the superior court for Lincoln county, Warren, J., entered September 28, 1908, dismissing an action to enjoin the issuance of municipal bonds, after a trial before the court without a jury. Reversed.

Merritt, Oswald & Merritt, for appellant.

Happy & Hindman and *Martin & Grant*, for respondents.

CHADWICK, J.—Plaintiff brought this action as a taxpayer, to enjoin the issuance of certain municipal bonds. The town made no appearance, and an order of default was entered. The defendants John F. Green, M. F. Adams, and A. G. Mitchum are copartners doing business under the firm name and style of the Bank of Harrington, at Harrington, Washington, and were allowed to intervene, alleging themselves to be taxpayers and property owners within the town of Harrington. The interveners alleged in their petition:

“That in the year 1907, at a special election held in the said Town of Harrington, over three-fourths of the qualified voters of said town voted to purchase a water system and to issue bonds for the payment therefor, to supply said town with water, and to pay therefor the said sum of twenty-two thousand dollars (\$22,000), and to issue bonds for said sum; and that after said election was held and carried, at the special instance and request of the said Town of Harrington, the said owner of said water system, Olnor Dobson, deeded said water works to said town, and said town is now and ever since has been in possession thereof, and collecting the revenues therefrom; that at the time said system was conveyed to the said town, these interveners, at the special instance and request of the said Town and said Olnor Dobson, paid to the said Dobson the said sum of \$22,000 in cash money, and the said town, with the consent of the said Dobson and of the interveners, promised and agreed to transfer and deliver the said \$22,000 of bonds when printed and executed, to these interveners, in payment of the said sum of \$22,000, so paid over to the said Dobson by these interveners at the special instance and request of the said Town of Harrington; and the said bonds have not yet been delivered to these interveners, as promised, but the said T. A. Hansard, plaintiff in

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the above entitled action, is now seeking to enjoin the said town from executing and delivering the said bonds to these interveners."

The foregoing is a succinct statement of the ultimate facts upon which the interveners rely, and we do not deem it necessary to make further mention of, or reference to, their complaint in intervention. To the complaint in intervention a motion to strike was interposed, upon the grounds, *inter alia*,

"(2) For the reason that said interveners have no right, title or interest in and to the subject-matter of this action, to wit: the right of said town, or its officers, to issue and sell said bonds for the reason that said interveners could not have or acquire any interest in said bonds although said bonds could be issued until said bonds were sold as by law provided.

"(3) For the reason that if the interveners have, or ever did have, the contract and arrangement as alleged in their complaint, whereby said bonds were to be turned over and delivered to them, such contract would be in contravention of law, the specific provisions of the statute of the state of Washington and against public policy."

This motion was overruled. After other proceedings, all of which occurred over the protest of plaintiff, the case proceeded to trial upon the complaint in intervention and denials of plaintiff; and, after hearing the evidence, the court ordered that plaintiff take nothing, and rendered judgment in favor of the interveners for their costs and disbursements.

A number of errors are assigned, but from the view of the case taken by us, it is unnecessary to discuss any of them other than those going to the full merit of the case. Waiving the question whether a taxpayer may substitute himself as a defendant in an action against a municipality, which has been brought into court under a proper process and has defaulted by direction of the council, thus substituting his judgment for that of the council, and trying out an individual right, and coming to the main question, it would seem

that respondents cannot recover. We know of no rule of law which permits a municipal corporation to contract a debt upon an agreement to issue bonds to cover it. To so hold in this case would be equivalent to holding that the court had the right and power to say that the contract should be executed—the bonds sold to interveners—when the right is reserved to and the duty put upon the corporate authorities to sell them in such manner as they should deem for the best interests of the town (Bal. Code, § 1077), and thus by judicial decree usurp and exercise a legislative function. It is within the power of a city or town to purchase a water works system and to issue its bonds to raise money to pay therefor, but it cannot contract a bond issue in advance of its authorization, and deliver them, over the challenge of a taxpayer. The bond must be in existence before it can be delivered or become an object of barter and sale.

“As was said by this court, in *Clark v. The City of Des Moines*, 19 Iowa 199 (i. e. 213), ‘this class of securities are made and issued for the express purpose of raising money by their sale.’ They cannot accomplish the purpose of their execution and issue except by being sold; and they cannot be sold without establishing their market value. They are made for the market, are sold in the market, and hence must have and always do have a market value; and while it is true that this value may and often does change, it is, nevertheless, always susceptible of very direct and satisfactory proof.” *Griffith v. Burden*, 35 Iowa 188.

To hold that a party advancing money at the request of the officers of a municipal corporation, upon their promise to reimburse the creditor by an issue of its negotiable bonds, can acquire a right of action would defeat both the purpose and spirit of the law.

There is another reason that would compel a reversal of this case in any event. The law provides that the system or plan proposed in the acquisition of a public improvement shall be submitted to the people for ratification or rejection. The ordinance before us goes no further than to recite the

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advisability of purchasing the existing water works system, and that "said town become indebted and issue its bonds as provided by law in the sum of twenty-two thousand (\$22,000) dollars, for the purchase of such water works." The plan or system is not set out. The time the bonds are to run, the rate of interest, the manner of payment, are all matters proper to be considered, and, without some mention thereof, the taxpayer cannot vote with that understanding contemplated by the statute. Payment is as much a part of the "plan or system" as is the purchase, and a method should be provided in the ordinance. Otherwise the voter has expressed his opinion upon a part only of the object sought to be attained.

From the authorities Mr. Simonton, in his work on Municipal Bonds, § 89, draws these conclusions:

"The title should state the object of the ordinance; then usually follows the introduction ordaining or enacting the ordinance, after which follows the scope and purpose of the ordinance. Hence when the object is to authorize the issue of bonds, the bonds should be directed to be issued, the purpose of the issue should be stated, the amount to be issued, the denomination of the bonds, when they shall bear date, time and place of payment, the rate of interest and place of payment thereof."

This we consider well within the reasoning of *Seymour v. Tacoma*, 6 Wash. 138, 32 Pac. 1077; *Buckley v. Tacoma*, 9 Wash. 253, 37 Pac. 441, and *Aylmore v. Seattle*, 48 Wash. 42, 92 Pac. 932. It will thus be seen that the interveners have sought to do indirectly what they could not have done directly; that is, put the stamp of legality upon a contract that could not have been enforced in a direct action. Having no standing in court to contest the right of appellant, and the town having defaulted, it follows that the motion for nonsuit was improperly entered.

The cause is reversed, and remanded with directions to enter a judgment of default in favor of the appellant and

against the town, and to dismiss the complaint in intervention.

RUDKIN, C. J., FULLERTON, GOSE, and MORRIS, JJ., concur.

[No. 8119. Department One. July 14, 1909.]

THE STATE OF WASHINGTON, *Respondent*, v.
FRANK LE PITRE, *Appellant*.¹

CRIMINAL LAW—TRIAL—WITNESSES—INDORSEMENT ON INFORMATION. Under Bal. Code, § 6832, requiring the names of known witnesses to be indorsed upon the information, it is not reversible error to allow the prosecuting attorney to indorse the names of witnesses at the trial without showing that they were unknown to him before, where no continuance was asked by the accused.

CRIMINAL LAW—PUNISHMENT—HABITUAL CRIMINALS. The habitual criminal statute simply provides an increased penalty for the last offense and does not violate any constitutional right of the accused.

CRIMINAL LAW—HABITUAL CRIMINALS—IDENTITY—EVIDENCE—SUFFICIENCY. The habitual criminal statutes authorizing the jury to find that the accused is an habitual criminal from the record of prior convictions "or" other competent evidence, is not objectionable as authorizing the finding from such records alone without proof of identification.

SAME—EVIDENCE—HARMLESS ERROR. One convicted of being an habitual criminal is not prejudiced by erroneous admission of identity as to crimes committed outside the state, where there was sufficient evidence of other convictions in this state.

SAME—EVIDENCE OF IDENTITY—PRIMA FACIE CASE. Upon a conviction of being an habitual criminal, the record of previous convictions showing the same, is sufficient *prima facie* evidence of identity, when received without objection.

Appeal from a judgment of the superior court for Walla Walla county, Brents, J., entered December 15, 1908, upon a trial and conviction of a felony and of being an habitual criminal. Affirmed.

¹Reported in 103 Pac. 27.

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M. A. Stafford, for appellant.

Otto B. Rupp, Herbert C. Bryson, and Everett J. Smith,
for respondent.

CHADWICK, J.—Appellant was convicted of a felony in the superior court of Walla Walla county; whereupon a supplementary information was filed under the habitual criminal statute. Laws 1908, page 125. On December 11, 1908, the case was called for trial and a jury impaneled and sworn to try the case. At the trial the court allowed the prosecuting attorney, over the objection of appellant, to indorse the name of a witness upon the information. This witness testified as to the identity of the accused. Appellant was convicted, and now asks us to set aside the verdict.

It is first contended that the statute (Bal. Code, § 6832; P. C. § 2078), is imperative, and that the names of the witnesses known to the prosecuting attorney at the time of the filing of the information cannot be thereafter indorsed. It is admitted that the names of witnesses can be indorsed at any stage of the trial, but it is said this can only be done upon a proper showing that the witnesses were unknown prior to the time the application was made. A number of cases from other states are cited to sustain this contention; but, whatever the rule may be elsewhere, it is settled in this state that the indorsement of the names of witnesses upon an information is largely a matter of discretion with the court; and, in the absence of a showing of abuse or that some substantial injury has resulted to the accused, the order of the court will not be reversed. Counsel complains that the question has never been squarely decided by this court. In *State v. Holedger*, 15 Wash. 553, 46 Pac. 652, the court said:

“It has been frequently held by this court that such act on the part of the prosecuting attorney will only entitle the defense to a continuance. It not appearing from the record that a continuance was asked for in this cause, for the reason alleged, the objection will not be sustained.”

In *State v. Bokien*, 14 Wash. 403, 44 Pac. 889, the following language appears:

"It will be observed that no express provision is made for the indorsement of the names of any witnesses after the trial has begun. Does it follow from this that the court may not permit the indorsement of the names of witnesses during the course of the trial, if necessary to the attainment of justice? We think it does not."

In that case the case of *State v. Cook*, 30 Kan. 82, 1 Pac. 32, was quoted, the court adopting its reasoning. It is unnecessary to reproduce the quotation here. Suffice it to say that it sustains the principle so often announced by this court, that such order of itself does not constitute reversible error. *State v. Kelly*, 14 Wash. 702, 45 Pac. 38; *State v. Lewis*, 31 Wash. 515, 72 Pac. 121; *State v. Sexton*, 37 Wash. 110, 79 Pac. 634; *State v. Van Waters*, 36 Wash. 358, 78 Pac. 897.

The habitual criminal statute is a thing of modern creation, and while there are many rules of law which may seem inconsistent with its purpose and the procedure adopted to compass it, it is nevertheless sound in principle and sustained by reason. Aside from the offender and his victim, there is always another party concerned in every crime committed—the state; and it does no violence to any constitutional guarantee for the state to rid itself of depravity when its efforts to reform have failed. The act is not *ex post facto*. It does not deny the right of trial by jury. It does not put the offender twice in jeopardy. It does not inflict a double punishment for the same offense, or inflict a cruel or unusual punishment, or impose a penalty for crimes committed outside of the state. It merely provides an increased punishment for the last offense. Wigmore, Evidence, § 196; Cooley, Const. Lim. (6th ed.), 327; *Re Miller*, 110 Mich. 676, 68 N. W. 990, 64 Am. St. 376; (34 L. R. A. 398, where all of the earlier cases are collected in an elaborate monographic note) and 6 Decennial Digest, col. 1200-1204 (where the later cases will be found).

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The spirit of the law is in keeping with the acknowledged power of the legislature to provide a minimum and maximum term within which the trial court may exercise its discretion in fixing sentence, taking into consideration, as it should always, the character of the person as well as the probability of reformation; or the legislature may take away all discretion and fix a penalty absolute, as it does in many instances. When the statute under discussion is so considered, the seeming objections are void of force. It is said, however, that a proper construction of § 2 of the act, "and if such jury find, from the record thereof [meaning the record prior to conviction] or other competent evidence, . . . such jury shall make a return of such fact to the court," evidently means that the legislature intended to provide for a conviction of an habitual criminal upon the production of prior certified records of conviction and upon those records alone; and cases are cited to sustain the proposition that the word "or" in a criminal statute should not be interpreted to mean "and." Inasmuch as the record before us discloses three convictions within the state of Washington, which appear to be sufficient to bring the appellant under the ban of the law, we are at a loss to fully understand the position taken by him. For, if we admit that the testimony of the witness whose name had been indorsed on the information was wrongfully received upon the question of identity as to crimes committed without the state, there was still enough before the jury occurring in the courts of this state to warrant his conviction.

The only possible question that could arise would be as to the identity of the accused. The records of conviction showing the same name were received without objection. Under the general rule that identity of names is *prima facie* evidence of identity of persons, it was enough to make out a *prima facie* case. If it were otherwise, the testimony of the

witness whose name was properly indorsed and who was competent to testify proved the identity of the appellant.

The judgment is affirmed.

RUDKIN, C. J., GOSE, FULLERTON, and MORRIS, JJ., concur.

[No. 8030. Department One. July 14, 1909.]

SADIE HATTIE *et al.*, *Appellants*, v. FRANK W. POTTER *et al.*,
Respondents.¹

CANCELLATION OF INSTRUMENTS—FRAUD—UNDUE INFLUENCE—WANT OF CAPACITY—EVIDENCE—SUFFICIENCY. Fraud will be inferred and a deed set aside for want of capacity, where it appears that the grantor, an aged inmate of a charity hospital, upon inheriting an estate of the value of \$20,000 through the death of his son, suffered a general break down and made voluntary conveyances of all the property to one heir to the exclusion of others, without any natural reason therefor, at a time when his mind was so weakened that he was peculiarly susceptible to influence, and he probably did not have sufficient intelligence to understand the nature of the transaction.

SAME—CONVEYANCE FROM PARENT TO CHILD—UNDUE INFLUENCE—BURDEN OF PROOF. When an aged parent conveys all his property to a daughter to the exclusion of other heirs, without any consideration for his future support, the burden of proof is upon the grantee to show by clear and convincing evidence that it was fair and fully understood by the grantor.

Appeal from a judgment of the superior court for Lincoln county, Warren, J., entered July 8, 1908, upon findings in favor of the defendants, in an action to set aside conveyances on the ground of fraud and want of capacity, after a trial before the court without a jury. Reversed.

Wallace Dinsmore and *Martin & Wilson*, for appellants.

W. H. Carlin and *Joseph Sessions*, for respondents.

MORRIS, J.—Orson Tucker died intestate in Lincoln county, Washington, on the 8th day of August, 1908, leaving sur-

¹Reported in 102 Pac. 1023.

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viving him his father, John J. Tucker, his sole heir, then an inmate of the Yuba county hospital, at Marysville, California. The property of Orson Tucker consisted of lands and personal property situate within Lincoln county, of the value of \$20,000, now in the possession of John E. Frazer, his administrator. On August 15, 1906, John J. Tucker gave a power of attorney to Frank W. Potter, husband of his daughter Minnie Potter, being a general power of attorney as to all lands and property of the estate of Orson Tucker. Under this power of attorney Potter went to Lincoln county and procured the appointment of Frazer as administrator. On November 12, 1906, John J. Tucker gave a deed to his daughter Minnie Potter of all the Lincoln county lands descending to him as sole heir of his son Orson, and on the same day made an assignment to her of all his rights, title, and interests in and to the estate of his son Orson.

John J. Tucker died March 25, 1907, leaving surviving him his daughter Minnie Potter, and the minor appellants, children of two other daughters, now deceased; and thereafter this action was commenced on behalf of said minors to set aside said deed and assignment, upon the grounds of fraud, undue influence, and insufficient mental capacity. Upon issue being joined, trial was had, resulting in a decree sustaining the validity of these instruments, and this appeal.

As is usual in cases of this character, the evidence is somewhat conflicting, but we think it is established that John J. Tucker lost his wife about thirty-five years ago. He made no effort to maintain his family together but, leaving them in custody of others, he spent his time working upon ranches near Marysville. His only home, in so far as it can be said he had one, seems to have been with a bachelor friend named Shay, with whom he lived more or less for thirty-five years. He seems to have been a good worker, and to have commanded good wages until he began to fail physically; but nobody seems to know what became of the money he earned, unless he spent it in an occasional spree, which seems to have

been more or less of a habit with him when he visited Marysville. In addition to his wages, he received money from his mother's estate, but nobody seems to know how much, or what became of it. He continued to work as long as he was able, until, as Shay says, he "couldn't hold a saw any more," when Shay obtained a permit for him and he entered the county hospital as a charity inmate, on June 27, 1904, being at that time seventy-four years of age.

The details of his life at the hospital are naturally very meager, but he seems to have been what would ordinarily be expected of a man of his age and physical condition, until the death of his son, when, according to the testimony of the hospital steward, he had a "break-down," mentally and physically, and his entire condition and habit seem to have greatly changed. A few instances of this change are given: Before that time he used to peel potatoes each day in preparation for dinner; afterwards he either would or could not; at least he did not. Before the death of his son he was somewhat careful about his appearance; would be the first one to ask for clean clothes from the steward Sunday morning; afterwards he paid no attention to his clothes, and they would be taken to his bed. He did not seem to realize it was Sunday. He was in the habit of crying; would hold the hands of the steward and cling to him in a helpless manner. At bed time he would go to the operating room and other rooms, wandering around, and complain of being lost; would forget where he put his tobacco; complain of losing his money. He was somewhat deaf, and had lost the power of speech to some extent, so that it was difficult to understand him. Before his so-called breakdown, he is described as being quite talkative; afterwards he did not seem to want to talk. Before he went to the hospital he was very exact about his money matters; as his old friend Shay says: "He was very exact, that old man was; he wanted the last cent." After the son's death he seemed, the steward testified, to have no idea of money matters. A physician, to whom a

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hypothetical question was propounded based upon his physical and mental condition as testified to by some of the witnesses, says the facts would indicate *senile dementia*.

This was the man from whom this power of attorney was obtained by his son-in-law shortly after the son's death, and by whom later on the deed and assignment were executed, transferring all his property without consideration to his daughter. Concerning the execution of these several papers there is no competent evidence that gives much history of them. We know little about them, except that they were executed. Hence we must depend largely upon all the facts and circumstances surrounding and in any wise reflecting upon the acts, to determine their character. In cases of this character it is not necessary to establish an absolute loss of mentality. Complainants do not have to prove the insanity of the grantor. It is sufficient to show that the mind was in such a weakened condition, from either mental or physical infirmities, that it could be found there was not sufficient intelligence to understand fully the nature and effect of the transaction complained of; or, if so, that the conveyance was executed under such circumstances that it ought not to be upheld, or as would justify the interference of equity for its cancellation; especially where, as in this case, we find allegations of fraud and undue influence imposed upon an old man seventy-seven years of age, conveying all his property to one heir to the exclusion of others, and leaving himself stripped of property of the value of \$20,000, and continuing to be an inmate of a county poor house until his death. Such a transaction is upon its face of doubtful propriety, and justifies a careful scrutiny into its fairness. Such a man as the evidence shows John J. Tucker to have been at the time of the execution of these instruments could easily have been imposed upon; and the inference may well be drawn, and courts of equity will not be slow to draw it, that they were obtained by fraud or circumvention. A party in such a mental condition is easily exposed to fraudulent designs, so pow-

erless to escape them and too dull to suspect, that courts deem it their duty to interpose, and that upon the ground of fraud. *Van Horn v. Keenan*, 28 Ill. 445.

We can find in this record no natural reason for this old man's act. This daughter and her husband, who became the sole beneficiaries of these conveyances, had lived for two years in the same city. The husband was a merchant. They do not seem to have taken much interest in him until he became possessed of this property. The steward says he never saw the daughter at the hospital. The daughter says she was there once prior to the time she moved to Reno. Her husband admits on his direct examination that, prior to the time this property came to the old gentleman, he never went to see him; says he was too busy. On cross-examination, this fact being called to his attention, he says he did go to see him; thinks he might have dropped in when he was riding by; but he can give no time nor details of such visit. It is safe to assume they were never made. As soon as the brother dies, they become very much interested in the welfare of the father and the disposition of the property. We find the daughter interviewing her brother-in-law Hattie as to the disposition of Orson's property, and when Hattie suggested that the father would be the heir, she tells him, "the old man was childish and incapable of taking care of the property;" and this she does not deny, although she did deny other statements attributed to her by Hattie in that same conversation. As evidence that her husband was of the same opinion, we find him, after the execution of this deed and assignment, giving \$10 to the steward to dole out to the old gentleman as he might need it. If the old gentleman was thought by Potter to be capable of caring for and managing his property interests, why not give him the money to spend as he himself might determine? The idea of the Potters seems to have been that the father was fully capable of dealing with property of the value of \$20,000, when they were the beneficiaries of his act, but he could not properly handle

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\$10 when he himself was the beneficiary. During the two years this daughter lived at Marysville, we find no evidence of any little gifts of clothing and comforts, so useful and needful to a man living in such a place as the father, and so prone to be offered by those who have the ordinary affection of child for parent; but as soon as the old gentleman becomes possessed of the son's estate, when for the first time since he became an inmate of this county poor farm or hospital he was in a financial situation to administer to his needs and desires, we find the son-in-law Potter taking him down town and buying him some articles of apparel such as shirts, socks, suspenders, underwear, etc. Is it too much for a court of equity in such a case to say there is a presumption and inference of undue influence and fraud that must be rebutted by strong proof before a conveyance under such circumstances will be permitted to stand?

We can find little in the record of the circumstances directly surrounding the execution of these several instruments. All we know of the power of attorney is that it was prepared by Carlin, the attorney of Potter for fifteen years, within a day after Potter's return to Marysville, and that it was executed by John J. Tucker at the hospital. The witnesses to the instrument give it as their opinion that he was all right mentally at that time. Potter leaves for Washington to examine into the property left by Orson Tucker. The old gentleman in the meantime makes no allusions to this visit, or what was expected to result from it. It would be supposed that this would be such an epoch in the old gentleman's life that he would have mentioned it. It would not be strange to find some elation at the prospect of leaving this charity home, or some reference to his future conduct; but there is no mention of any of these things. It is not difficult to assume the reason was the old gentleman had no understanding nor conception of the situation. Upon Potter's return from Washington we find his attorney Carlin dic-

tating the deed and assignment, and the old gentleman being taken down town by Potter, who purchases some shirts and socks for him, and then the old gentleman enters Carlin's office alone and executes the deed and assignment. Potter did not accompany him, but it is not difficult to find that it was because of the suggestion and influence of Potter that he went there. And then Potter returns with him to the hospital, leaves \$10 with the steward for his use, and, his mission being ended, departs for Reno. Two persons who were present in Carlin's office say the old gentleman said when entering that "he came to sign papers on request of Mr. Carlin." When or by whom this request was made the record is silent, but the strong inference and probability are that it was made by Potter, just before the visit was made.

At the time of the execution of these instruments John J. Tucker was not insane. Neither was he in such a state of mental imbecility as to render him entirely incapable of executing a valid deed; but the conclusion is to our minds irresistible that he was, by reason of his bodily infirmities, superinduced by the death of his son, in such a condition of mental weakness as to render him peculiarly susceptible to any influence which in his weakened mental condition he could neither meet nor combat. In such cases imposition or undue influence will be inferred. *Allnore v. Jewell*, 94 U. S. 506, 24 L. Ed. 260.

In the above case the court quotes from *Harding v. Wheaton*, reported in 2 Mason 378, as follows:

"Extreme weakness will raise an almost necessary presumption of imposition, even when it stops short of legal incapacity, and though a contract in the ordinary course of things, reasonably made with such a person, might be admitted to stand, yet if it should appear to be of such a nature as that such a person could not be capable of measuring its extent or importance, its reasonableness or its value, fully and fairly, it cannot be that the law is so much at variance with common sense as to uphold it."

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The court continues:

"The same doctrine is announced in adjudged cases almost without number; and it may be stated as settled law, that whenever there is great weakness of mind in a person executing a conveyance of land, arising from age, sickness, or any other cause, though not amounting to absolute disqualification, and the consideration given for the property is grossly inadequate, a court of equity will upon proper and seasonable application of the injured party, his representatives or heirs, interfere and set the conveyance aside."

The consideration named in the deed was \$10; that in the assignment was a "valuable consideration." It is admitted nothing was paid, and they are now claimed as voluntary gifts. We think the present case a proper one for the application of the principles above quoted. In the case of *Hunter v. McCammon*, 104 N. Y. Supp. 402, it is said, in speaking of a conveyance by a mother to her daughter, attacked on the ground of fraud:

"This situation imposed upon the defendant the burden of showing that the transaction was fair, open, voluntary, and well understood, where the relationship between the parties is that of parent and child, principal and agent, or where one party is situated so as to exercise a controlling influence over the will and conduct of another, transactions between them are scrutinized with extreme vigilance, and clear evidence is required that the transaction was understood and that there was no fraud, mistake or undue influence. Where those relations exist there must be clear proof of the integrity and fairness of the transaction or any instrument thus obtained will be set aside."

In *Croissant v. Beers*, 118 Ill. App. 502, the court uses this language:

"We hold the law to be that where an aged and infirm parent conveys substantially all his property to a child, without consideration, and without any contract to support, it is for the child to show that the conveyance was fair and reasonable."

The respondents have not, in our opinion, met this burden. They have not convinced us that these transactions were open and fair and fully understood and appreciated by John J. Tucker. They have failed to show any reason why this old and infirm man, who in his days of mental and physical vigor was shown to be exact, careful, and insistent to the last cent in his financial transactions, should give away all his property to one heir to the exclusion of the others, without any consideration for his future support and maintenance, without any provision for sufficient money to procure him the few bodily comforts and necessities he could not obtain in his charity home, and leave himself penniless and an inmate of this county hospital until his death. It is too improbable, and no court ought to sustain such a conveyance without clear and convincing proof of its fairness and full appreciation and understanding of its consequences on the part of the grantor. Not finding such evidence in this case, the judgment is reversed, and the case is remanded with instructions to the lower court to enter its judgment in conformity with the views herein expressed.

RUDKIN, C. J., GOSE, FULLERTON, and CHADWICK, JJ.,
concur.

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[No. 7687. Decided July 15, 1909.]

CHARLES HOFFMAN *et al.*, Plaintiffs and Appellants, v.
SPOKANE JOBBERS ASSOCIATION, Defendant and
Cross-Appellant, J. B. CAMPBELL, Trustee in
Bankruptcy, Intervener and
Cross-Appellant.¹

PROCESS—SERVICE—SUBSTITUTED SERVICE. Under Bal. Code, § 4875, providing for a substituted service upon defendant "at the house of his usual abode," service upon a clerk at defendant's place of business is insufficient.

REPLEVIN—PROCESS—SERVICE OF AFFIDAVIT. In replevin, service of the affidavit is not sufficient service of process in lieu of the summons and complaint.

PARTNERSHIP—POWERS OF PARTNERS—CONFESSING JUDGMENT IN TORT—PROCESS. In the absence of statute, one partner cannot, in an action of replevin arising in tort, confess by stipulation a judgment enforceable against partnership property, without his copartner's consent; Bal. Code, § 5095, for the confession of judgments by a partner being confined to actions on contract.

APPEAL—PRESERVATION OF GROUNDS—OBJECTIONS IN LOWER COURT. After trial of an issue raised by an affirmative defense, to which no reply has been filed, the defendants cannot on appeal claim that they were entitled to a default and judgment, where the point was not pressed and no motion therefor made in the court below.

Appeal from a judgment of the superior court for Spokane county, J. D. Campbell, Esq., judge *pro tempore*, entered April 17, 1908, awarding property to plaintiffs and denying them damages, after a trial before the court without a jury, in an action of replevin. Affirmed.

Samuel R. Stern, for appellants.

Danson & Williams, for cross-appellants.

CROW, J.—In 1904 the plaintiffs, Charles Hoffman, Edward S. Rothchild, Joseph S. Silverberg, and Maurice Schweitzer, copartners as Hoffman, Rothchild & Company, sold certain merchandise on credit to the defendants, George

¹Reported in 102 Pac. 1045.

Martin and Charles B. Roosa, copartners as Martin & Roosa, then doing a mercantile business in Uniontown, Washington. The plaintiffs claim that to secure credit Martin & Roosa made to them and to certain commercial agencies false representations as to their financial worth. The firm of Martin & Roosa was dissolved on May 4, 1905, Martin selling his interests to Roosa. On May 15, 1905, Roosa made a voluntary assignment to the Spokane Jobbers Association, a corporation, for the benefit of the creditors of Martin & Roosa.

On May 21, 1905, the plaintiffs elected to rescind their sale, and commenced this action in Whitman county against Martin & Roosa and the Spokane Jobbers Association to replevin the goods sold. They alleged that Martin & Roosa had made the false and fraudulent representations to obtain credit; that relying thereon the plaintiffs sold them goods of the value of \$2,190.75, upon which no payments had been made; that the firm of Martin & Roosa had been dissolved, and that Roosa had made an assignment to the Spokane Jobbers Association, to which the plaintiffs had not consented. Upon receipt of the proper affidavit and bond, the sheriff of Whitman county seized a portion of the goods, which he afterwards delivered to plaintiffs. No service was made upon Martin or Roosa, but the sheriff's return shows that he served copies of the summons and complaint upon one E. W. Newman, in Whitman county, at defendants' storehouse, the said E. W. Newman being then and there a person of suitable age and discretion and an employee of said defendants.

After plaintiffs had seized a portion of the goods, other creditors of Martin & Roosa filed a petition in involuntary bankruptcy, in the district court of the United States for Eastern Washington, whereupon George Martin and Charles B. Roosa were adjudged bankrupts, as individuals and partners, and one J. B. Campbell, who was elected their trustee in bankruptcy, was by stipulation of the parties appearing, permitted to intervene in this action. On October 18, 1905, the

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defendant Spokane Jobbers Association and the intervener, J. B. Campbell, as trustee in bankruptcy, filed their answer, in which they affirmatively alleged that the plaintiffs had participated in and agreed to the voluntary assignment made by Charles B. Roosa; that thereby the plaintiffs had waived their right to rescind, and should be estopped from so doing.

No reply appears in the record, nor was any default claimed for want thereof. By a written stipulation the venue was changed to the superior court of Spokane county. Trial was commenced before J. D. Campbell, judge *pro tempore*, on July 6, 1907, Martin and Roosa failing to appear. After several adjournments, final judgment was entered on April 17, 1908, by which the plaintiffs were awarded the goods which they had seized, but were denied any judgment against Martin & Roosa as damages for the value of the goods not seized. From this judgment all parties appearing have appealed, and we will allude to them in this opinion as plaintiffs, defendant, and intervener.

The only evidence admitted was that offered by the plaintiffs. At its close the defendant Spokane Jobbers Association and the intervener, J. B. Campbell, trustee in bankruptcy, challenged its legal sufficiency, and moved that the complaint be dismissed. They further moved that, in the event of a denial of their motion to dismiss, the plaintiffs' recovery be limited to the retention of the goods seized under their affidavit in replevin. On argument, some question arose as to whether service had been made upon the defendants Martin and Roosa, and the cause was continued until April 10, 1908, to enable the plaintiffs to show the condition of the record in that regard. Thereafter, on April 10, 1908, the plaintiffs offered the following stipulation:

"It is hereby stipulated and agreed by and between Samuel R. Stern, attorney for the above named plaintiffs, and P. W. Kimball, attorney for the defendant, C. B. Roosa, individually, and as a member of the firm of Martin & Roosa, that judgment may be taken herein against the said defendant Roosa

individually and as a copartner of said firm, as though said defendant were in default for want of pleading and further appearance, it being the purpose of this stipulation to avoid the necessity of a formal motion for judgment against said defendant and because the said defendant does not intend further to appear herein, either in behalf of himself or the firm of which he was a member, and the referee herein may, without further notice, permit judgment to be taken as prayed for in the complaint, and such judgment may be entered herein as though applied for prior to the close of the plaintiffs' case before the Hon. J. D. Campbell, referee in bankruptcy.

"Dated this first day of April, 1908.

"Saml. R. Stern, Attorney for Plaintiffs.

"P. W. Kimball, Attorney for Defendant C. B. Roosa."

Thereupon the court denied permission to the plaintiffs to file the stipulation, and entered judgment as above stated. Two questions are presented for our consideration: (1) whether the plaintiffs were entitled to a judgment against the firm of Martin & Roosa for the return of the goods not taken, or their value; and (2) whether they were entitled to retain the goods actually taken by them under their affidavit in replevin.

The plaintiffs contend that the trial court erred, (1) in its refusal to allow them judgment against the firm of Martin & Roosa for the value of the goods not recovered, and (2) in its refusal to file the offered stipulation and to allow them judgment by confession against the firm of Martin & Roosa thereon. The plaintiffs were not entitled to judgment against the firm of Martin & Roosa without service on, or appearance by, them. The record fails to show that they were served, that they entered their appearance, or that any default was claimed against them. The substituted service upon E. W. Newman, clerk of the defendants, at their place of business, was of no value. Bal. Code, § 4875 (P. C. § 333), provides:

"The summons shall be served by delivering a copy thereof . . . to the defendant personally, or by leaving a

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copy of the summons *at the house of his usual abode* with some person of suitable age and discretion *then resident therein.*"

Jurisdiction of the defendants could not be obtained under this section by the service shown in the sheriff's return. Plaintiffs assert that the service of the affidavit in replevin upon the defendants Martin and Roosa was a sufficient service of process in lieu of the summons and complaint; but such contention cannot be sustained for the reasons (1) that we have no statute authorizing any such service of an affidavit in an action of replevin to obtain jurisdiction of the parties, and (2) that in any event the affidavit in replevin was served in the same manner as the summons and complaint; that is, upon E. W. Newman at the defendants' place of business.

The only question for us to consider on the plaintiffs' appeal is whether the stipulation authorized judgment against the firm. On this stipulation the trial judge did enter judgment against the defendant Charles B. Roosa individually, but the plaintiffs failed to insert therein the amount allowed. It is manifest that the stipulation did not authorize the entry of any judgment against the partnership upon which the plaintiffs could receive a dividend from the proceeds of the partnership assets in the bankruptcy proceeding. In the absence of any statute to the contrary, one partner cannot execute a power to authorize the confession of a judgment against the firm without the consent of his copartner. *Bank of Shelton v. Willey*, 7 Wash. 535, 35 Pac. 411; 1 Bates, Partnership, § 377; George, Partnership, § 94.

Section 5095, Bal. Code (P. C. § 744), has to some extent changed this rule in actions upon contract, and in *Bank of Shelton v. Willey*, *supra*, this court, commenting on said section, in effect held that one partner in such an action may confess a judgment against all the partners, enforceable only against the partnership property, or the separate property of the partner making the confession. In this action, however, the plaintiffs have elected to rescind their contract of

sale, and are prosecuting an action of replevin arising in tort. On the stipulation and record before us, the plaintiffs were not entitled to any judgment enforceable against the partnership or its assets.

The defendant and intervener, by their cross-appeal, contend that, in the absence of any reply to their affirmative answer, they are entitled to judgment against the plaintiffs for the return or value of the goods actually taken by them, because the plaintiffs thereby admit that they had waived their right to rescind. The defendant and intervener are in no position to make this contention on the record before us. It does not appear that they attempted to default the plaintiffs on their failure to reply, that they moved for judgment, or that they called the attention of the trial court to this particular point in presenting their challenge to the evidence. This action was commenced in 1905. The answer was filed in October of that year. Final judgment was not entered until April, 1908. The defendant and intervener went to trial on pleadings which they now claim raised no issue. The entire record indicates that the only purpose of the trial was to determine whether the plaintiffs were entitled to judgment against the firm of Martin & Roosa for the recovery or value of the goods which they had failed to take under their affidavit in replevin. If the defendant and intervener were seeking a return of the goods which the plaintiffs had taken on their affidavit in replevin herein, they should have pressed that point by motion for judgment, or at the trial in the court below. It is too late for them to raise it for the first time in this court on their cross-appeal.

The judgment is affirmed. Neither party will recover costs in this court.

RUDKIN, C. J., MOUNT, DUNBAR, and FULLERTON, JJ., concur.

CHADWICK, GOSE, PARKER, and MORRIS, JJ., took no part.

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[No. 7737. Decided July 15, 1909.]

FRUITLAND IRRIGATION COMPANY, *Respondent*, v.
GEORGE W. SMITH *et al.*, *Appellants*.¹

EMINENT DOMAIN—AWARD OF DAMAGES—APPEAL—REVIEW. Upon appeal from an award of damages in a condemnation proceeding, only errors going to the propriety or justness of the award can be reviewed.

CONTINUANCE—GROUNDS—TIME FOR APPLICATION—SHOWING. It is not an abuse of discretion to deny a continuance in a condemnation case, asked when the case was called on February 26th, because the ground was covered with snow and could not be shown to the witnesses, where the party made no objection on February 10th to the setting of the case for trial on February 14th, and made no showing that conditions had changed, and where the opposite party was in court ready for trial when the case was called.

JURY—RIGHT TO TRIAL—WAIVER. Failure to demand a jury in a condemnation proceeding at the time the case is set down for trial waives the right to a jury trial.

Appeal from a judgment of the superior court for Stevens county, Carey, J., entered February 28, 1908, upon findings in favor of the plaintiff, awarding damages in a condemnation proceeding, after a trial before the court without a jury. Affirmed.

Judson & Rochford (*W. C. Jones*, of counsel), for appellants.

Osee W. Noble and *W. C. Stayt*, for respondent.

MOUNT, J.—The appellants in this case were awarded damages in the sum of \$380, for land taken by the respondent for a right of way for an irrigation canal across appellants' premises. The appeal is taken from the award of damages.

We shall not refer to errors alleged which do not go to the propriety or justness of the award, because such errors, if made, cannot be reviewed upon this appeal. *Western*

¹Reported in 102 Pac. 1031.

American Co. v. St. Ann Co., 22 Wash. 158, 60 Pac. 158; *Seattle & M. R. Co. v. Bellingham Bay & E. R. Co.*, 29 Wash. 491, 69 Pac. 1107, 92 Am. St. 907.

It appears that, after the lower court had made the preliminary adjudication of the public use and necessity for the taking of appellants' property, and directed the question of damages to be tried "before a jury or, if a jury be waived, as in civil cases in courts of record, in the manner prescribed by law, then before the court or judge thereof," the respondent, on January 30, served a notice upon appellants' counsel of record that, on February 10, 1908, respondent would apply to the court to have the case set down for trial. On February 10, 1908, appellants appeared by counsel in the cause and made no objections, either to the notice or the service thereof, or to the setting of the case for trial, and made no demand for a jury, a jury having been waived. The court thereupon fixed the date of the trial at two o'clock on February 14, 1908. For some reason not appearing in the record, the case was not brought on for trial until February 26, 1908. At that time the appellants appeared and moved for a continuance of the trial, upon the ground that they were not ready for trial, because the lands were then covered with snow eighteen to twenty-four inches in depth, and because the stakes showing the right of way were completely covered and could not be found, and witnesses could not be shown the character of the soil on the line of survey and could not be obtained to testify to the value of the lands taken or damaged; that appellants had been informed by one of their counsel that the trial was not to take place until after the snow had disappeared. This motion was denied by the court, and appellants base error thereon.

It is true that the cause had been pending on demurrer for several months previous during the summer of 1907, but on February 10, 1908, when the case was noticed to be set for trial, the appellants appeared and made no objection to setting the case for trial, and the case was thereupon set

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for trial on the 14th of February. It seems to us that, if the appellants had any objection to the case being tried, such objection should have been urged on the 10th of February, when the court set the date of the trial. They made no objection at that time, and they have made no showing that the conditions were different on the 26th from what they were on the 10th of February. The respondent was in court ready for trial, presumably with all his witnesses, on and after the 14th of February. We think, therefore, that the trial court did not abuse his discretion in denying the motion for a continuance at that time.

Appellants contend that the court erred in denying the demand for a jury trial. As seen above, appellants were present in court and made no demand for a jury when the case was set down for trial. Appellants, therefore, waived their right to a jury (*Chelan County v. Navarre*, 38 Wash. 684, 80 Pac. 845), and it was not error for the court afterwards to deny the request when the case was on for trial.

We think the evidence justifies the finding of the court upon the amount of damages. There is no error in the record, and the judgment must therefore be affirmed.

RUDKIN, C. J., CROW, FULLERTON, DUNBAR, CHADWICK, and GOSE, JJ., concur.

[No. 7827. Decided July 15, 1909.]

J. R. FRANCIS, *Appellant*, v. SPOKANE AMATEUR ATHLETIC CLUB, *Respondent*.¹

CORPORATIONS — REPRESENTATION BY OFFICERS — EMPLOYMENT OF SERVANTS—NOTICE OF AUTHORITY. Where the by-laws of a corporation empowered the board of trustees, alone, to employ servants and assistants, a custom to allow the manager to make an oral contract of hire of a clerk, with weekly or monthly wage payments and without fixing the term, is not sufficient to authorize the manager to hire a clerk for a period of 26 weeks, when the clerk had actual knowledge of the extent of the manager's authority.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered May 15, 1908, upon findings in favor of the defendant, in an action on contract, after a trial before the court without a jury. Affirmed.

Fred Miller and *F. W. Girard*, for appellant.

Samuel R. Stern, for respondent.

FULLERTON, J.—On December 24, 1907, one M. J. Leary, who was then acting as manager of the respondent corporation, entered into a contract with the appellant by the terms of which he purported to hire the appellant on behalf of the corporation as office clerk for a period of 26 weeks, at \$20 per week, with extra pay for night service; the services to commence on February 1, 1908. The appellant entered upon the service at about the time stipulated and continued therein until February 21, 1908, when he was discharged by a new manager who had succeeded Leary on the 10th of the month. The appellant was paid in full for the services actually rendered, but conceived himself injured by the breach of the contract, and brought this action to recover therefor.

The respondent defended on the ground that the contract was one which Manager Leary had no authority to make, a

¹Reported in 102 Pac. 1032.

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fact known to both the appellant and Leary at the time the contract was entered into. The case was tried by the court sitting without a jury, and resulted in findings sustaining the respondent's contention. From the judgment entered thereon, this appeal was taken.

The by-laws of the appellant, as well as its articles of incorporation, vested the management of its affairs and business exclusively in a board of trustees, who alone were empowered to "employ and discharge such servants and assistants" as they should deem proper. The evidence, however, tended to show that the board had entrusted this duty to the manager, to the extent at least of permitting him to select the individual after the necessity for hiring the servant or assistant had been determined upon; but no express power had been conferred upon him, and the custom of the manager was to make an oral contract of hire, without specification as to the term of the employment, with weekly or monthly wage payments. It is on the strength of this custom that the appellant seeks to justify the contract in this instance, but we do not think it sufficient to authorize the holding that this contract was enforceable. Ordinarily, it is true, the contracts of an agent made on behalf of his principal are binding between the principal and a third person when within the apparent scope of the agent's authority, but the rule is one of necessity, intended for the protection of the innocent. It has no application when the person dealing with the agent has actual knowledge of the agent's powers. Here the evidence convinces us that the appellant had such actual knowledge of Leary's authority, and for that reason we hold he is not entitled to recover.

The judgment is affirmed.

RUDKIN, C. J., CHADWICK, GOSE, MOUNT, CROW, and DUNBAR, JJ., concur.

[No. 7872. Decided July 15, 1909.]

THE CITY OF CHEHALIS, *Appellant*, v. A. S. CORY *et al.*,
Respondents.¹

MUNICIPAL CORPORATIONS—IMPROVEMENTS—ASSESSMENTS—INSUFFICIENT ESTIMATES—EFFECT. The fact that a municipal improvement was estimated to cost only \$6,000, does not of itself make an assessment for nearly \$15,000 void for want of jurisdiction to make it, or because it operated as a fraud upon the property owners, in view of a statute requiring the court to enforce the lien "to the extent of the proper proportion of the value of the work," according to the benefits received, regardless of irregularities or defects; since the failure to make a proper estimate was a mere defect in the proceeding, and not a fraud upon the property owners.

Appeal from a judgment of the superior court for Lewis county, Reid, J., entered September 21, 1908, dismissing an action to foreclose a local assessment lien, upon sustaining objections to the jurisdiction of the court and the sufficiency of the complaint. Reversed.

G. E. Hamaker and *Forney & Ponder*, for appellant, cited: 17 Am. & Eng. Ency. Law, pp. 1041, 1042; Brown, Jurisdiction (2d ed.), p. 7; Laws of 1907, p. 114; *Lewis County v. Gordon*, 20 Wash. 80, 54 Pac. 779; *Auditor General v. Chase*, 132 Mich. 630, 94 N. W. 178; *State, Kohler, pros. v. Guttenberg*, 38 N. J. L. 419; *In re Board etc.*, 20 N. Y. Supp. 563; *Dodsworth v. Cincinnati*, 18 Ohio Cir. Ct. 288, 10 Ohio Cir. Dec. 177.

Ellis, Fletcher & Evans and *S. C. White*, for respondents, cited: *Spokane Falls v. Browne*, 3 Wash. 84, 27 Pac. 1077; *Buckley v. Tacoma*, 9 Wash. 253, 37 Pac. 441; *North Yakima v. Scudder*, 41 Wash. 15, 82 Pac. 1022; *Kline v. Tacoma*, 11 Wash. 193, 39 Pac. 453; *Monk v. Ballard*, 42 Wash. 35, 84 Pac. 397; *Sanderson v. Ballard*, 42 Wash. 697, 84 Pac. 399; *Howell v. Tacoma*, 3 Wash. 711, 29 Pac. 447, 28 Am. St. 83; *Griggs v. Tacoma*, 3 Wash. 785, 29 Pac. 449; *Van-*

¹Reported in 102 Pac. 1027; 104 Pac. 768.

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couver v. Wintler, 8 Wash. 378, 36 Pac. 278, 685; *New Whatcom v. Bellingham Bay Imp. Co.*, 10 Wash. 378, 38 Pac. 1024.

FULLERTON, J.—The appellant, the city of Chehalis, sought by this action to foreclose an assessment lien levied by the city upon certain lots and blocks therein, for the purpose of paying the cost of improving a certain street upon which the property charged with the lien abutted. In its complaint the city averred facts tending to show a substantial compliance with the provisions of the statute relating to assessments for local improvements, and tending to show that it had a valid lien on each separate lot described to the amount of the charge against it. It did appear, however, from the complaint, that the estimated cost of the improvement as made by the city council was \$6,000, while the contract as let for the improvement called for an expenditure of \$14,812.50, or practically two and one-half times the amount of the estimate.

After the service of the summons and complaint upon them, a number of the property holders appeared and demurred to the complaint, which being overruled, they answered, putting in issue many of the allegations of the complaint and setting up some ten separate defenses. The averments in these defenses were put in issue by a reply, and on the issues thus made the cause was called for trial before the court. At the commencement of the trial the defendants interposed an objection to the jurisdiction of the court, and moved for judgment of dismissal on the grounds, among others, that the complaint showed upon its face that no cause of action existed against the defendants in favor of the plaintiff; and that the complaint showed upon its face that the city council of the city of Chehalis had never acquired jurisdiction to make any improvement on the street mentioned or to levy an assessment on the property abutting thereon. The court thereupon sustained the objections, and

entered a judgment dismissing the action as to each of the answering defendants. From the judgment so entered the city appeals.

The statute under which the city proceeded provides, in part:

"The city council shall before grading, paving or other improvement of any street or alley, the cost of which is to be levied and assessed upon the property benefited, first pass a resolution or ordinance declaring its intention to make such improvement and stating in such resolution or ordinance the name of the street or alley to be improved, the points between which the said improvement is made, and the estimate of the cost of the same, and the cost of the same is to be assessed against the property abutting (and included in the assessment district herein provided) on such street proposed to be improved, and shall fix a time not less than ten days in which protests against such proposed improvement may be filed in the office of the city clerk. It shall be the duty of such clerk to cause such resolution to be published in the official newspaper of the city in at least two consecutive issues before the time fixed in such resolution for filing such protest, and affidavit of such publication shall be filed on or before the time fixed for such filing. If protest against the proposed improvement by the owners of more than two-thirds of the front feet of lots and lands abutting on such proposed improvement and included in the assessment district therein proposed, be fixed [filed] on or before the date fixed for such filing, the council shall not proceed further with the work unless six members of said council shall vote to proceed with such work. If no such protest is filed, or if such protest is filed and six councilmen shall vote to proceed with such work, the council shall at its next regular meeting, proceed to consider the same, and shall then or at a subsequent time proceed to enact an ordinance for such improvement. . . . Such ordinance shall provide that such improvement shall be made, and that the cost and expense thereof shall be taxed and assessed upon all the property in such local improvement district, which cost shall be assessed in proportion to the number of feet of such land and lots fronting thereon, and included in said improvement district, and in proportion to the benefits derived by said im-

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provement. . . . Whenever any expenses or costs of work shall have been assessed on any lands, the amount of said expenses shall become a lien upon said lands, which shall take precedence of all other liens, except general tax liens, and which may be foreclosed in accordance with the provisions of the code of civil procedure. Said suit shall be in the name of the city of _____ (naming it) as plaintiff. And in any such proceedings where the court trying the same shall be satisfied that the work has been done or material furnished, which according to the true intent of the act would be properly chargeable upon a lot or land through or by which the street, alley or highway improved or repaired may pass, a recovery shall be permitted or charge enforced to the extent of the proper proportion of the value of the work or material which would be chargeable on such lot or land notwithstanding any informalities, irregularities or defects in any of the proceedings of such municipal corporation or its officers." Pierce's Code, § 3616 (Laws 1903, p. 231).

The trial judge sustained the objection of the property holders and dismissed the proceeding on the ground that the discrepancy between the estimated cost of the improvement and its actual cost was so great as to amount to a fraud upon the property holders whose property it was proposed to assess. The learned judge argued that a property holder might be perfectly willing to submit to an assessment for the improvement of a street which was to cost only \$6,000 while he might object bitterly to one costing two and a half times that sum, and that to give notice of an improvement to cost only the first sum named and then to levy for the cost of the improvement a grossly excessive sum was virtually an assessment without notice, and a denial of the right of protest given by the statute.

But forceful as this reasoning is, we do not think it conclusive against the right of the city to foreclose the lien. The fact that the city in the original resolution underestimated the cost of the work it contemplated doing does not leave it without jurisdiction to levy an assessment in

some amount on the abutting property benefited. It may be that the property owners, by showing that they were misled by the underestimate, are entitled to have their assessments reduced, in the language of the statute, "to the extent of the proper proportion of the value of the work," but this is the extent of their rights. Under the express provisions of the statute, the court must enforce the lien to this extent notwithstanding informalities, irregularities, or defects in the proceedings, and the failure of the city council to make an accurate estimate of the cost of the work was but a defect in the proceedings.

The case of *Buckley v. Tacoma*, 9 Wash. 253, 37 Pac. 441, is not in point. That case was based on the principle that certain provisions of the city charter of the city of Tacoma which conferred jurisdiction on the council had not been complied with. Here no jurisdictional requisite was omitted. There were defects in the proceedings which may or may not affect the amount of the levy, but none such as require a dismissal of the proceedings as an entirety.

The judgment appealed from is reversed, and the cause remanded with instructions to reinstate the same, and proceed to a trial upon the issues involved.

RUDKIN, C. J., CHADWICK, GOSE, DUNBAR, MOUNT, and CROW, JJ., concur.

ON PETITION FOR REHEARING.

[*En Banc*. November 2, 1909.]

CHADWICK, J.—A petition for a rehearing of this case has been filed, in which it was urged that the court erred in not holding the special assessment void. Many authorities are cited to sustain the contention of the respondents that the council cannot, by resolution and without notice to the property owner, provide for an assessment, or let a contract in excess of the amount of the estimated cost, of which sum the property owner has had due notice. We acknowledge it to be the general rule that the council is bound by the amount

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of the estimated cost of a special improvement, and cannot, without proper notice to the property owner, provide for the expenditure of a greater sum. But in our judgment the law of 1903, p. 231, is controlling. The statute referred to is quoted in the main opinion, but in aid of our present argument, the following is apropos:

"And in any such proceedings where the court trying the same shall be satisfied that the work has been done or material furnished, which according to the true intent of the act would be properly chargeable upon a lot or land through or by which the street, alley or highway improved or repaired may pass, a recovery shall be permitted or charge enforced to the extent of the proper proportion of the value of the work or material which would be chargeable on such lot or land notwithstanding any informalities, irregularities or defects in any of the proceedings of such municipal corporation or its officers."

It will be seen that it was the evident intent of the legislature to so frame the law that property which had received the lawful benefit of an improvement should meet the cost thereof in such an amount as, according to the true intent and meaning of the act, would be properly chargeable against it. In the case at bar, the council had jurisdiction to levy an assessment not exceeding \$6,000; beyond this it could not go without notice. But the fact that it did so, does not prevent a levy for the full amount of the original estimate; for, by the very terms of the act, the jurisdiction of the council is preserved, to the end that a recovery may be had to the limit of compliance, disregarding all informalities, irregularities, or defects in the proceedings leading up to the final assessment.

It is also urged that, if it was the intention of the court to hold that the assessment should be limited to the amount of \$6,000 on the whole district affected, it was not made clear by our former opinion. We had supposed that this followed as a logical deduction from our reasoning. If it does not, it may now be understood that we hold that the assessment

made by the city of Chehalis was not avoided by the fact that the cost of the work was \$14,812.50, whereas the cost, as estimated in the original notice, was but \$6,000; that the act of the council in so proceeding was a mere irregularity, and to the extent of the original estimate, or \$6,000, it has full power to levy upon each lot or tract affected its proper proportion of the cost according to the true intent and meaning of the law.

The petition for rehearing is denied.

FULLERTON, MOUNT, GOSE, and CROW, JJ., concur.

[No. 7895. Department Two. July 15, 1909.]

CHARLES PASSOW & SONS, *Respondent*, v. KIRKWOOD
DISTILLERY COMPANY, *Appellant*.¹

EVIDENCE — PAROL EVIDENCE TO VARY WRITING — CONTRACTS. A written contract for the sale of goods on consignment providing the compensation for the services of the consignee shall be the excess of the selling price over the prices fixed by the consignor, cannot be varied by parol evidence that the consignors agreed to fix a price ten per cent less than the regular list price; when the course of dealing showed that such oral agreement had not been omitted from the written contract by inadvertence or mistake.

SAME. A contract for the sale on consignment of such goods as the consignors shall see fit to send to the consignee at Spokane, Washington, cannot be varied by parol evidence that the consignees were to have the exclusive agency for the sale of the consignor's goods in the states of Idaho and Washington.

SAME. Where a bill of goods was ordered prior to the parties' entering into a written contract to sell goods on consignment, but was not delivered until thereafter, oral evidence that the parties agreed that the bill be paid for under the terms of the contract does not vary the terms of the contract, and is admissible.

TROVER AND CONVERSION — FACTORS — REFUSAL TO RETURN GOODS HELD ON CONSIGNMENT. Where the consignee refuses to return unsold goods, held for sale on consignment, "free on board cars consigned to the consignor" as required by the contract, the latter may treat such refusal as a conversion and recover the value.

¹Reported in 103 Pac. 34.

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Opinion Per RUDKIN, C. J.

Appeal from a judgment of the superior court for Spokane county, Carey, J., entered September 24, 1908, upon the verdict of a jury rendered in favor of the plaintiff, after a trial on the merits, in an action on contract. Affirmed.

Cohn, Delameter & Blake and *Belden & Losey*, for appellant.

Samuel R. Stern, for respondent.

RUDKIN, C. J.—This action was instituted to recover the value or the contract price of certain goods consigned by the plaintiff to the defendant. The plaintiff had judgment in accordance with the prayer of its complaint, and the defendant has appealed.

Inasmuch as the principal assignments of error are based on the rulings of the court admitting or excluding testimony under the written contract between the parties, we deem it necessary to set the contract forth at length in this opinion:

"This Indenture, made and entered into this 1st day of February, A. D. 1907, by and between Louis A. Passow and Henry E. Passow of Chicago, County of Cook, State of Illinois, parties of the first part, and the Kirkwood Distillery Co., a corporation doing business at Spokane, County of Spokane, State of Washington, parties of the second part, Witnesseth:

"That the said parties of the first part shall send and forward to the said parties of the second part at Spokane, Wash., to be received on consignment by the parties of the second part, such saloon fixtures, billiard and pool tables and other goods manufactured by the party of the first part as the said parties of the first part shall see proper. The party of the second part is to receive for their compensation, for their services in selling and disposing of such goods as may be forwarded and consigned to them, under the terms of this agreement, the excess of the amount which shall be received for such goods as sold by them over and above the prices fixed by the said parties of the first part, in forwarding and consigning goods as aforesaid.

"It is further understood and agreed that the business shall be carried on by the said parties of the second part, under the name of the said first parties and that all sales of goods made by the second parties shall be made in the name of the first parties, and that the title to all goods so forwarded and consigned to the second parties by the first parties, shall be and remain in said first parties' name.

"It is further understood and agreed that the authority of the said second parties shall be and is hereby limited to that of mere sales agent of and for the first parties in selling the aforesaid goods, and that the said second parties shall have no authority whatever to bind said first parties as such sales agent and have no authority to contract or incur any indebtedness or obligation of any kind whatever of the said first parties.

"It is further agreed that the second parties shall at all times keep at his own expense all goods in their possession which may be forwarded and consigned to them under this contract insured in their own name and for the benefit of the first parties in some reliable, solvent insurance company or companies to be approved by the said first parties in an amount equal to at least to the price fixed aforesaid by the first parties and shall deliver all policies of insurance upon said goods to the first parties immediately upon receiving same.

"It is further understood and agreed that the said parties of the second part shall pay all freight charges upon said goods so consigned to them and storage thereon, if any, and all rents which may occur for the use of the rooms in carrying on the business, and other expenses of every kind, name and description incurred on the account of or in connection with the conduct of the business.

"It is further mutually understood, covenanted and agreed by and between the parties hereto that if at any time any of the said goods as aforesaid consigned to the parties of the second part by the parties of the first part shall be seized upon attachment, levy or other process or in any manner taken possession of or claimed by any officer or person claiming the same in hostility to the rights and title of the parties of the first part, then and in that case the parties of the first part shall at its option have the right to take and demand immediate possession as against the parties of the second part, and any and all persons whomsoever.

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"It is further agreed that no goods shall be sold by the second parties at prices less than that fixed by the first parties in consigning such goods and that in all cases where sales are made on credit, at least one-third of the purchase price shall be paid by the purchaser in cash at the time of making sale, and the title of all goods sold on credit shall be and remain in the said first parties until fully paid for by the purchaser, and that a conditional sale instrument reserving title in the said first parties purchasing the goods and by the second parties thereto, which conditional sale shall state the terms and conditions of the sale and shall be filed in the office of the County Auditor or Recorder, as the case may be, in which the property is situated as prescribed by the laws of the state (if any such provision exists therein), in which the property may be situated, which conditional sale contract shall provide that the balance of the purchase price of goods sold shall be paid in at least ten equal monthly payments.

"It is further understood and agreed that where the parties of the second part elect to sell on time any of the goods or chattels of the first parties and receiving less than one-third cash payment, that the parties of the second part are to remit to the parties of the first part sufficient sum to cover one-third of the value of the goods at the consigned price. It is also agreed that copies of all contracts, together with all papers are to be sent to the office of the parties of the first part and where a series of notes are taken for the balance due, the parties of the first part are to retain sufficient notes to cover the other two-thirds due on the goods sold, retaining the first and every alternating note and the remaining notes are to be sent to the parties of the second part as their compensation. Where a cash sale is made the parties of the second part are to receive full commission at the time settlement is made in cash.

"It is further agreed that all conditional sales and contracts and instruments in connection with such sales, shall be subject to the approval of the first parties of this contract, unless otherwise instructed in writing, and that the second parties shall pay the recording fees for all such instruments and any other expense attendant thereto.

"It is further agreed that on all sales on which a loss occurs, by fire, failure, etc., of the purchaser, the second

party agrees to pay the first party the amount of such loss to the extent of the consigned price.

"It is further agreed that the party of the second part is to make prompt reports to the parties of the first part of all sales of consigned goods and make prompt remittance of all moneys received through cash or time sales.

"It is further agreed and understood that the second parties shall not sell, handle or manufacture any line of goods that will come in competition with the goods manufactured by the first parties, such saloon fixtures, pool and billiard tables, bowling alleys, etc., designs of which are illustrated in the first parties' catalogues and advertising matter, during the life of this contract, without the written permission of the parties of the first part.

"It is further mutually understood and agreed that this contract may be terminated by either party hereto by giving 90 days' written notice to the other of the intention to terminate the same, and that immediately upon the termination of this contract the said parties of the second part shall and does hereby agree to deliver all of its goods then on hand free on board cars at Chicago, Ill., consigned to the parties of the first part at Chicago, Ill. The parties of the first part, however, at its own option, elect to receive such goods from the parties of the second part at Spokane, Washington, instead of having them shipped to it at Chicago.

"It is further understood and agreed that on the termination of this contract, the second parties will turn over all the moneys in their hands and also all contracts, papers and documents of every kind and description, in connection with the business, or concerning the sales of goods, to the first parties and to pay to the first parties any and all damages which the first parties may have suffered or sustained on account of damage or injury to the goods while in possession of the second parties.

"It is further understood and agreed that the second parties shall furnish the first parties with a bond, subject to the approval of the first parties, to insure the fulfillment of the obligations and conditions of this contract by the second parties."

The answer of the appellant contained numerous affirmative defenses wherein it sought to vary and modify the terms of the written contract, and the exclusion of testi-

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mony tending to establish these defenses forms the basis of several of the assignments of error.

(1) The answer alleged that the parties to the written contract agreed that the price of the goods to be consigned under it should be ten per cent less than the regular list price then in force and published and distributed by the respondent, and that such agreement was omitted from the written contract through accident and mistake. The contract itself provided that the appellant was, "To receive for their compensation, for their services in selling and disposing of such goods as may be forwarded and consigned to them, under the terms of this agreement, the excess of the amount which shall be received for such goods as sold by them over and above the prices fixed by the said parties of the first part, in forwarding and consigning goods as aforesaid." The course of dealing between the parties under the written contract and under an earlier contract of similar import shows conclusively that the agreement set forth in the answer was not omitted from the written contract by accident or mistake, and inasmuch as the offered testimony tended to vary and contradict the written contract the objection to its introduction was properly sustained.

(2) The answer further alleged that it was agreed between the parties that the appellant should have the exclusive agency for the sale of the respondent's goods during the life of the contract for the territory of Washington and Idaho, and that the respondent's goods should be sold in that territory only through the agency of the appellant, and damages were claimed for the violation of this agreement. The written contract provided that the respondent should "Send and forward to the said parties of the second part at Spokane, Wash., to be received on consignment by the parties of the second part, such saloon fixtures, billiard and pool tables and other goods manufactured by the party of the first part as the said parties of the first part shall see proper." This defense tended to vary and contradict

the terms of the written contract and evidence offered to sustain it was properly rejected. What we have said in reference to these two defenses applies with equal force to the third.

(3) It appears from the testimony that a certain bill of goods amounting to the sum of \$2,252.06 was ordered before the written contract was entered into, but was not consigned or delivered until after the signing and delivery of the written contract. Oral testimony was offered by the respondent tending to show an agreement between the parties that this bill of goods should be paid for under the terms and conditions of the written contract. The ruling of the court admitting this testimony is assigned as error, and the appellant earnestly insists that the testimony thus received tended to vary and contradict the written contract. Manifestly such is not the case. The oral testimony simply tended to show the terms and conditions upon which goods already ordered were to be paid for, and did not in the slightest degree tend to vary, contradict or add to the writing. The written contract was referred to for the sole purpose of fixing the terms and conditions of payment, but this in no manner changed or affected the written contract itself.

(4) It is further contended that the court erred in permitting a recovery for certain goods consigned to the appellant which were not sold or disposed of. The written contract provided that, upon its termination, the appellant should deliver all goods then on hand free on board the cars consigned to the respondent at Chicago, Illinois. This the appellant failed, neglected and refused to do, and the respondent had a right to treat such refusal as a conversion and to recover the value of the goods.

(5) Error is assigned in the giving and refusing of instructions, but these assignments relate to questions already considered. The foregoing discussion covers the principal assignments of error, and a careful inspection of the

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record convinces us that the appeal is without substantial merit. The judgment is therefore affirmed.

DUNBAR, PARKER, MOUNT, and CROW, JJ., concur.

[No. 7995. Department Two. July 15, 1909.]

AMELIA M. WECKTER, *as Administrator etc., Appellant*, v.
GREAT NORTHERN RAILWAY COMPANY *et al.*,
Respondents.¹

MASTER AND SERVANT—NEGLIGENCE—CAUSE OF DEATH—EVIDENCE—SUFFICIENCY—NONSUIT. In an action for the death of a brakeman, alleged to have been knocked from a car by an unusual crash in switching, there is not sufficient evidence of the cause of his death to submit the case to a jury, and a nonsuit should have been granted, where there was no direct proof as to the cause of his death, and it merely appears that his body was found on the tracks about fifteen minutes after an unusual crash in switching cars, which experts testified would have been sufficient to knock him off the top of a car, that it would have been his duty to be at the brakes, that his lantern was found on the top of a car and he was last seen ascending a car; as the cause of death would be left to conjecture.

SAME—DIRECTION OF VERDICT. In such a case, it is proper to direct a verdict for the defendants, even if the plaintiff made a case in the first instance, where the defendants' evidence showed that the crash of cars was caused by two cars coming together on a track other than the one on which the brakeman met his death, and that the car he was seen to be climbing had been cut loose from the train and was slowly passing down a track other than the one on which the crash of cars occurred.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered March 8, 1909, in favor of the defendants, by direction of the court, after a trial before the court and a jury, in an action to recover for the death of a railway brakeman. Affirmed.

W. H. Plummer and F. H. McDermont, for appellant, cited: *Woodall v. Boston Elevated R. Co.*, 192 Mass. 308,

¹Reported in 102 Pac. 1053.

78 N. E. 446; *Jucker v. Chicago & N. W. R. Co.*, 52 Wis. 150, 8 N. W. 862; *Hopkins v. Boyd*, 18 Ind. App. 63, 47 N. E. 480; *Lunde v. Cudahy Packing Co.* (Iowa), 117 N. W. 1067; *Elliff v. Oregon R. & Nav. Co.* (Ore.), 99 Pac. 76; *Hartvig v. Northern Pac. Lumber Co.*, 19 Ore. 522, 25 Pac. 358; *Schumaker v. St. Paul etc. R. Co.*, 46 Minn. 39, 48 N. W. 559, 12 L. R. A. 257; *Hayes v. Michigan Cent. R. Co.*, 111 U. S. 228, 4 Sup. Ct. 369, 28 L. Ed. 410; *Atchinson etc. R. Co. v. Love*, 57 Kan. 36, 45 Pac. 59; *Choctaw etc. R. Co. v. McDade*, 191 U. S. 64, 24 Sup. Ct. 24, 48 L. Ed. 96; *Marande v. Texas & Pac. R. Co.*, 184 U. S. 173, 22 Sup. Ct. 340, 46 L. Ed. 487; *Adams v. Bunker Hill etc. Min. Co.*, 12 Idaho 637, 89 Pac. 624; *Cameron v. Great Northern R. Co.*, 8 N. D. 124, 77 N. W. 1016; *Garretson v. Tacoma R. & Power Co.*, 50 Wash. 24, 96 Pac. 511; *Allend v. Spokane Falls & N. R. Co.*, 21 Wash. 324, 58 Pac. 244; *White v. Chicago etc. R. Co.*, 1 S. D. 326, 47 N. W. 146; *Kenney v. Hannibal etc. R. Co.*, 70 Mo. 243; *Johns v. Ash*, 50 Wash. 559, 97 Pac. 748; *Anderson v. Northern Pac. R. Co.*, 19 Wash. 340, 53 Pac. 345; *State v. McIntyre*, 53 Wash. 178, 101 Pac. 710.

F. V. Brown, A. J. Laughon, and J. J. Lavin, for respondents.

RUDKIN, C. J.—On the 10th day of October, 1908, H. A. Weckter, husband of the plaintiff, Amelia M. Weckter, was in the employ of the Great Northern Railway Company as a brakeman, and met his death on the evening of that day while in the performance of his duty. This action was instituted against the company and one of its locomotive engineers to recover damages for wrongfully causing the death. As near as can be ascertained from the circumstantial evidence found in the record, the death of the brakeman resulted from a fall from the hindmost of three cars switched from what is called the passing track to the industrial track, on the line of the defendant company's road at Deer Park,

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in this state. The negligence charged in the complaint was, in substance, that the engineer in charge of the train upon which the deceased was braking was incompetent; that the defendant company had knowledge of such incompetency; and that the engineer negligently, carelessly, and without warning crashed into the cars upon which the deceased was braking, thereby throwing him from the train and causing his death. At the close of the testimony the court directed a judgment in favor of the defendants, and the plaintiff has appealed.

The sufficiency of the evidence to warrant the submission of the case to the jury is the sole question presented for our consideration. There were three tracks running north and south on the line of the respondent company's road at Deer Park where the accident happened, viz.: the westerly track called the main track, the middle track called the passing track, and the easterly track called the industrial track. The industrial track was connected with the middle or passing track by a switch a short distance south of the Deer Park depot.

The testimony on the part of the appellant tended to show substantially the following facts: A number of witnesses testified that, about 7 o'clock on the evening in question, they heard cars come together in the yards at Deer Park with an unusual crash. The crash was so unusual that it attracted the attention of the witnesses, and some of them testified that it shook the buildings at a considerable distance from the tracks. Several of these witnesses were indoors at the time, and none of them saw the cars that came together or knew which of the three tracks the cars were on. They all testified, however, that the sound came from the general direction of the switch connecting the passing track with the industrial track south of the depot. They further testified that they learned of the death of the brakeman about ten or fifteen minutes after hearing the crash in question.

Another witness testified that he was standing in front of a

drug store, some considerable distance from the switch, and saw some person going up the side of one of the cars with a lantern a few seconds before the crash testified to by him and the other witnesses, but who the person was or what car or track he was on the witness did not know. The front brakeman was called as a witness by the appellant, and testified that he last saw the deceased brakeman alive as he was climbing up the side of one of the cars switched onto the industrial track, with his lantern in his hand, and that the death of the brakeman was reported to him about ten or fifteen minutes later. The body of the deceased was found along the outer side of the industrial track a considerable distance back from the switch. Blood and hair were found on the outer rail of the industrial track about 130 feet back from the switch, the lantern carried by the deceased was found on the top of one of the cars, and his keys and some other of his effects were found scattered along the track between the point where the blood and hair were discovered on the track and the place where the body was found some distance further back.

Expert testimony was offered tending to show that it would have been the duty of the deceased brakeman to be on the top of the cars switched onto the industrial track for the purpose of setting the brakes, and that, if the engine or train collided with the cars on which the deceased was standing with the force testified to by the several witnesses, the crash would result in hurling or throwing him from the car. This we think is a fair statement of the appellant's case, aside from testimony tending to show incompetency on the part of the engineer and the company's knowledge of such incompetency.

At the close of the appellant's case the court denied a motion for nonsuit, with permission to renew the motion at the close of all the testimony. The respondent thereupon called two witnesses. The first, a blacksmith, residing at Deer Park, testified that he crossed the Great Northern tracks at Deer

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Park about 7 o'clock on the evening in question, going from the hotel to the Masonic hall, and that as he attempted to cross the middle or passing track two cars crashed together immediately in front of him on the passing track, that he passed around the end of the cars and on to the hall and was informed of the death of the brakeman about ten or fifteen minutes thereafter. The front brakeman was recalled by the respondents, and testified that at the time he saw the deceased climbing up the side of the car, as already testified to by him, the car upon which the deceased was riding or climbing had been cut loose from the train, and was passing slowly down the industrial track, and that no other or further switching was done on the industrial track from the time he thus saw the deceased alive until after he met his death. After the introduction of this testimony the motion for a directed judgment was renewed and granted.

It seems to us that the appellant failed to make out a *prima facie* case in the first instance. The testimony left the cause of death a mere matter of speculation and conjecture. Before reaching a verdict the jury would have to find, or rather assume, that the engine or train crashed into the car upon which the deceased was standing, and that such crash was the cause of his death. There is certainly no direct testimony in the record tending to sustain such a finding. If the death of appellant's intestate could only be accounted for through such a crash as that testified to by the several witnesses, there might be some reason or necessity for submitting the case to the jury; but it is a matter of common knowledge that trainmen meet their death every day by slipping or falling from cars and that such hazards are incident to their employment. There are numerous cases in this court where the circumstantial evidence on the part of the plaintiff tended to show the cause of the injury or death with even greater certainty or probability than does the testimony in this record, but in each case this court held that a recovery was unwarranted. *Hanson v. Seattle Lumber Co.*, 81

Wash. 604, 72 Pac. 457; *Armstrong v. Cosmopolis*, 32 Wash. 110, 72 Pac. 1038; *Reidhead v. Skagit County*, 33 Wash. 174, 73 Pac. 1118; *Stratton v. Nichols Lumber Co.*, 39 Wash. 323, 81 Pac. 831, 109 Am. St. 881; *Stone v. Crewdson*, 44 Wash. 691, 87 Pac. 945; *Peterson v. Union Iron Works*, 48 Wash. 505, 93 Pac. 1077; *Olmstead v. Hastings Shingle Mfg. Co.*, 48 Wash. 657, 94 Pac. 474; *Whitehouse v. Bryant Lumber etc. Co.*, 50 Wash. 563, 97 Pac. 751. The same rule obtains and is firmly established in other jurisdictions. *Searles v. Manhattan R. Co.*, 101 N. Y. 661, 5 N. E. 66; *Grant v. Pennsylvania etc. R. Co.*, 133 N. Y. 657, 31 N. E. 220; *Tyndale v. Old Colony R. Co.*, 156 Mass. 503, 31 N. E. 655; *Borden v. Delaware etc. R. Co.*, 131 N. Y. 671, 30 N. E. 586; *Cumberland etc. R. Co. v. State*, 73 Md. 74, 20 Atl. 785, 25 Am. St. 571; *Sorenson v. Menasli Paper etc. Co.*, 56 Wis. 338, 14 N. W. 446; *Manning v. Chicago etc. R. Co.*, 105 Mich. 260, 63 N. W. 312; *Patton v. Texas & Pac. R. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361.

Furthermore, should we concede that the appellant made out a *prima facie* case in the first instance, we think the case made was overcome by the testimony offered by the respondent; and in reaching this conclusion we do not presume to pass upon or determine the effect of conflicting testimony. The testimony offered by the respondent was entirely consistent with that offered by the appellant, but nevertheless it explained away every inference favorable to the appellant that the jury might draw from the circumstances testified to by other witnesses. A crashing together of cars was shown to have occurred upon a track other than that upon which the deceased met his death, and the testimony of the front brakeman shows conclusively that death was not caused in the manner claimed by the appellant. The latter witness was first called by the appellant, and she, in a measure at least, vouched for his credibility. She should not be permitted to say now that he testified truly when he said he saw the deceased on the side of a car, but falsely when he

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testified where the car was at the time and to other circumstances surrounding the accident. From a careful examination of the entire record, we are of opinion that the judgment of the court below is free from error, and should be affirmed. It is so ordered.

DUNBAR, PARKER, MOUNT, and CROW, JJ., concur.

[No. 8072. Department Two. July 15, 1909.]

AUGUST KRUG, *Appellant*, v. ELMER HENDRICKS,
Respondent.¹

JUDGMENT—BAR—RES JUDICATA—MATTERS CONCLUDED. A judgment dismissing an action upon an express contract for a broker's commission in a specified sum is *res judicata* in a second action to recover for the same services on an agreement to pay the reasonable value of the services, where the findings of fact in the former action determined that the plaintiff had no agreement with defendant for a commission, and that plaintiff failed to prove that he acted as agent for the defendant in contracting the sale or that there was any contract existing between them.

Appeal from a judgment of the superior court for Stevens county, Carey, J., entered December 28, 1908, upon findings in favor of the defendant. Affirmed.

Slater & Allen, for appellant.

Jesseph & Grinstead, for respondent.

RUDKIN, C. J.—Some time prior to the 11th day of April, 1905, the present plaintiff commenced an action against the defendant in the superior court of Stevens county, to recover a commission on the sale of real property. The complaint in that action alleged that, prior to the 10th day of January, 1905, the defendant was the owner of certain real property, therein described; that the plaintiff was a real es-

¹Reported in 102 Pac. 1049.

tate agent; that, prior to the 15th day of December, 1904, the plaintiff and defendant entered into an agreement whereby the plaintiff promised and agreed to use his best endeavors to find a purchaser for said real property, at the price of \$6,500; that, in case the plaintiff failed to secure a purchaser, he should receive no commission or compensation for his services, but in case he should succeed in finding a purchaser at said price the defendant promised and agreed to pay the plaintiff a commission of five per cent on the selling price; that the plaintiff fully performed the terms and conditions of this contract on his part, and found a purchaser for the property satisfactory to the defendant, at the price agreed upon, that the defendant sold the property to the purchaser so found for the sum of \$6,500, and that by reason of the premises the plaintiff became entitled to a commission in the sum of \$325, no part of which had been paid. The defendant answered, putting in issue every material allegation of the complaint, except his ownership of the property therein described. The case was tried before the court without a jury. The court found, among other things:

"That at the time of contracting for the sale of the said ranch to the said Richart and at the time of the sale thereof, and for a long time prior thereto, the plaintiff, August Krug, had no agreement or understanding with the defendant for a commission as real estate agent or otherwise, if the said sale or any other sale of said property was made.

"That the plaintiff failed to prove by a preponderance of evidence that he acted as agent for the defendant in the contracting of the sale of and the sale of said ranch to the said Richart.

"That the plaintiff failed to prove by a preponderance of the evidence that there was existing between him and the defendant, a contract as alleged in the complaint or any contract at all for the sale of defendant's ranch;"

and entered judgment dismissing the action. An appeal was prosecuted to this court where the judgment was affirmed. *Krug v. Hendricks*, 41 Wash. 410, 83 Pac. 417.

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Thereafter the present action was instituted to recover the same commission, the complaint alleging that the plaintiff performed services for the defendant in procuring a purchaser for the defendant's property; that the defendant accepted the services so performed and promised and agreed to pay the plaintiff the reasonable value thereof; that the reasonable value of such services was the sum of \$325; and that payment was demanded and refused. The defendant denied the material allegations of the complaint, and pleaded the former judgment in bar of the action. The court sustained the plea of former adjudication, and from the judgment of dismissal, the present appeal is prosecuted.

The appellant contends that the former action was brought on an express contract, and that the judgment of dismissal was no bar to a second action to recover for the same services on a *quantum meruit*. If it appeared that the former action was dismissed on the sole ground that the appellant failed to prove the express contract as alleged, there might be some merit in this contention, but the findings and decision in the first action went far beyond this. The court found in effect that the appellant did not act as agent for the respondent in the sale of the property, and that there was no contract for a commission between the appellant and the respondent as alleged in the complaint or at all. These findings were within the issues in the first action, and clearly barred a recovery under the allegations of either complaint. In fact both actions were brought upon express contracts, the former on an express promise to pay an agreed commission of five per cent on the selling price, the latter on an express promise to pay the reasonable value of the services. The second action was not based on an implied promise to pay the reasonable value of services performed at the instance and request of the respondent, for the complaint did not allege that the services were so performed. On the contrary, the appellant based his right of action on an express promise

to pay after the services were performed, and the findings in the former action are conclusive against any such claim.

The judgment of the court below is therefore affirmed.

DUNBAR, PARKER, MOUNT, and CROW, JJ., concur.

[No. 7561. Department One. July 16, 1909.]

IDA BUSH, *Respondent*, v. INDEPENDENT MILL COMPANY,
Appellant.¹

MASTER AND SERVANT — NEGLIGENCE — APPLIANCE — PROXIMATE CAUSE. Where, in stepping over a shaft, the overalls of an employee were caught upon an unprotected, projecting set screw in a collar, the proximate cause of a resulting injury is the negligent failure to use a sunken set screw which would have avoided the danger.

MASTER AND SERVANT—INJURIES—DEATH OF SERVANT—PERFORMANCE OF DUTY—QUESTION FOR JURY. Where an employee took an oil can and ascended a ladder to oil machinery, which it was his duty to do eight or ten times a day, and was killed by being caught on an unguarded set screw on the way to the machinery, there is a question of fact for the jury as to whether he was killed while in the performance of his duty.

SAME—CAUSE OF DEATH—EVIDENCE—SUFFICIENCY—QUESTION FOR JURY. In an action for the death of an employee, there is sufficient evidence of the cause of his death to require submission of the case to the jury, where it appears that, as required to do eight or ten times a day, he started with an oil can evidently to pass a line shaft upon which there was an unguarded set screw, in order to oil machinery, that his trouser's leg was found caught by the set screw, torn and wound around the shaft, and he was hurled to the floor, receiving injuries from which he died.

MASTER AND SERVANT—ASSUMPTION OF RISKS—DUTY TO SERVANT. The fact that an employee as an oiler was also a millwright, does not preclude a recovery for his death caused by contact with a set screw, when the testimony shows that he could not make any alterations without obtaining the consent of the foreman, and that the foreman knew of the unguarded condition of the set screw and did not direct it to be safeguarded.

¹Reported in 103 Pac. 45.

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Citations of Counsel.

SAME—DUTIES OF SERVANT—EVIDENCE—MATERIALITY. In an action for the death of an oiler, who was also a millwright, expert evidence as to the duties of a millwright is inadmissible where the deceased was not employed in such duties.

TRIAL—INSTRUCTIONS—BURDEN OF PROOF. An instruction as to the burden of proof is correct when it defined the same as requiring a party to establish the fact to the satisfaction of the jury by a fair preponderance of the evidence.

MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—TWO WAYS—MOMENTARY FORGETFULNESS—QUESTION FOR JURY. It cannot be said as a matter of law, that an employee is guilty of contributory negligence in stepping over a shaft elevated 16 to 18 inches, upon which there was a projecting set screw known to him, where that was one of two ways used by different persons to reach the machinery to be oiled, and the more convenient and practicable way owing to obstructions in the other way; since the act was not necessarily dangerous, and the jury had a right to infer that he had momentarily forgotten the set screw.

TRIAL—INSTRUCTIONS. It is not error to state that the evidence is conflicting when that is the fact.

SAME. It is not error to refuse instructions covered in the general charge.

Appeal from a judgment of the superior court for Pierce county, Reid, J., entered April 21, 1908, upon the verdict of a jury rendered in favor of the plaintiff, in an action for the death of an employee caught by a set screw upon a revolving shaft. Affirmed.

Hudson & Holt, for appellant. The plaintiff cannot recover because the deceased himself was charged with the duty as millwright of maintenance and repairs. *Woelflen v. Lewiston-Clarkston Co.*, 49 Wash. 405, 95 Pac. 493; 5 Thompson, Negligence, §§ 5342, 5352; *Reno, Employer's Liability Acts*, § 54; *Birmingham Furnace & Mfg. Co. v. Gross*, 97 Ala. 220, 12 South. 36; *Pioneer Mining & Mfg. Co. v. Thomas*, 133 Ala. 279, 32 South. 15; *Conroy v. Inhabitants of Clinton*, 158 Mass. 318, 33 N. E. 525; *Roberts v. Missouri etc. Tel. Co.*, 166 Mo. 370, 66 S. W. 155; *Beall v. Pittsburgh etc. R. Co.*, 38 W. Va. 525, 18 S. E. 729; *Erskine v. Chino Valley Beet-Sugar Co.*, 71 Fed. 270; *Chicago etc. R.*

Co. v. Snyder, 117 Ill. 376, 7 N. E. 604. It was error to exclude evidence of his duties as millwright. *Birmingham Furnace & Mfg. Co. v. Gross*, *supra*. It was error to instruct that the burden was upon plaintiff to make out her case "to the satisfaction of the jury." *Ruff v. Jarrett*, 94 Ill. 475; *Wolff v. Van Housen*, 55 Ill. App. 295; *Bryan v. Chicago etc. R. Co.*, 63 Iowa 464, 19 N. W. 295; *Gage v. Louisville etc. R. Co.*, 88 Tenn. 724, 14 S. W. 73; *McBride v. Banguss*, 65 Tex. 177; *Fordyce v. Chancey*, 2 Tex. Civ. App. 24, 21 S. W. 181; *Finks v. Cox* (Tex. Civ. App.), 30 S. W. 512; *Feist v. Boothe* (Tex. Civ. App.), 27 S. W. 33; *Mitchell v. Hindman*, 150 Ill. 538, 37 N. E. 916; *Shinn v. Tucker*, 37 Ark. 580. It is error for the court to instruct the jury that there is, or that there is not, a dispute on any given question, unless it is perfectly clear and it is admitted. *Black v. Thornton*, 30 Ga. 361; *Bardwell v. Ziegler*, 3 Wash. 34, 28 Pac. 360. The defendant was not liable unless the deceased was in the performance of his duty at the time of the accident. 13 Ency. Plead. & Prac. 893; *Tutwiler Coal, Coke & Iron Co. v. Farrington*, 144 Ala. 157, 39 South. 898; *Southern R. Co. v. Williams*, 143 Ala. 212, 38 South. 1013; *Geis v. Tennessee Coal, Iron & R. Co.*, 143 Ala. 299, 39 South. 301; *Benson v. Lancashire etc. R. Co.*, 1 K. B. 292; *Smith v. South Normanton C. Co.*, 1 K. B. 24; 1 Dresser, Employers' Liability, § 13. All the essential requirements and conditions of liability fixed by the statute must exist before liability can arise under it, and in respect to these matters the statute is strictly construed. 4 Thompson, Negligence, §§ 4569-4582; Reno, Employers' Liability Acts, §§ 13, 14, 15; *Georgia Pac. R. Co. v. Propst*, 85 Ala. 203, 4 South. 711; *Dean v. East Tennessee V. & G. R. Co.*, 98 Ala. 586, 13 South. 489. The employer holds the affirmative of each of the statutory provisions on which this recovery depends. 6 Thompson, Negligence, § 7726; *Mobile & O. R. Co. v. George*, 94 Ala. 199, 10 South. 145. One who goes out of his way and thereby comes in contact with a set screw

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Citations of Counsel.

which he would not have otherwise encountered, is not entitled to the protection of the act. *Glens Falls Portland Cement Co. v. Traveler's Ins. Co.*, 162 N. Y. 399, 56 N. E. 897; *Powalske v. Cream City Brick Co.*, 110 Wis. 461, 86 N. W. 153. The burden is on the employee to show that breach of the master's duty was the proximate cause of the injury. Cooley, Torts, p. 69; 1 Shearman & Redfield, Negligence, p. 57; Reno, Employers' Liability Acts, §§ 53, 54, 55; 2 Labatt, Master & Servant, §§ 834-836, and cases cited. No action can be maintained where the cause of the accident is merely conjectural, or involved in such doubt and obscurity as to leave the proximate cause of it uncertain. 2 Labatt, Master & Servant, § 837; 6 Thompson, Negligence, §§ 7652-7698; 1 Shearman & Redfield, Negligence, § 57; *Dobbins v. Brown*, 119 N. Y. 188, 23 N. E. 537; *Peterson v. Union Iron Works*, 48 Wash. 505, 93 Pac. 1077; *Olmstead v. Hastings Shingle Mfg. Co.*, 48 Wash. 657, 94 Pac. 474; *Hansen v. Seattle Lumber Co.*, 31 Wash. 604, 72 Pac. 457; *Armstrong v. Cosmopolis*, 32 Wash. 110, 72 Pac. 1038; *Reidhead v. Skagit County*, 33 Wash. 174, 73 Pac. 1118; *Stratton v. Nichols Lumber Co.*, 39 Wash. 323, 81 Pac. 831, 109 Am. St. 881; Bailey, Master's Liability, 503; 17 American Negligence Cases, 250 to 280. The finding of the jury that the evidence failed to show that the deceased was caught while stepping over the set screw, and failed to show what he was doing or where he was going, constituted a finding against the party on whom the burden of proof with respect to these matters rested. *Morrow v. Com'rs Saline County*, 21 Kan. 484; *Union Pac. R. Co. v. Shannon*, 38 Kan. 476, 16 Pac. 836; *Flannery v. Kansas City etc. R. Co.*, 23 Mo. App. 120; *McMarshall v. Chicago etc. R. Co.*, 80 Iowa 757, 45 N. W. 1065, 20 Am. St. 445. The deceased was guilty of contributory negligence in failing to take reasonable precautions or use reasonable efforts to avoid the danger. 5 Thompson, Negligence, § 5328; *Woelflen v. Lewiston-Clarkston Co.* and *Beall v. Pittsburgh etc. R. Co.*, *supra*;

McCarthy v. Whitney Iron-Works Co., 48 La. Ann. 978, 20 South. 171; *Colorado Cent. R. Co. v. Martin*, 7 Colo. 592, 4 Pac. 1118; *Ramm v. Hewitt-Lea Lumber Co.*, 49 Wash. 263, 94 Pac. 1081; 25 Cyc. 1253; *Hoffman v. American Foundry Co.*, 18 Wash. 287, 51 Pac. 385; *Beltz v. American Mill Co.*, 37 Wash. 399, 79 Pac. 981; *Stratton v. Nichols Lumber Co.*, 39 Wash. 323, 81 Pac. 831, 109 Am. St. 881; *Bundy v. Union Iron Works*, 46 Wash. 231, 89 Pac. 545; *Steeple v. Panel & Folding Box Co.*, 33 Wash. 359, 74 Pac. 475. The conduct of the deceased, in coming in contact with the set screw in this case, was contributory negligence. *Hunter v. Washington Pipe etc. Co.*, 43 Wash. 167, 86 Pac. 171; *Bier v. Hqsford*, 35 Wash. 544, 77 Pac. 867; *Anderson v. Inland Tel. etc. Co.*, 19 Wash. 575, 53 Pac. 657, 41 L. R. A. 410; *Olson v. McMurray Cedar Lumber Co.*, 9 Wash. 500, 37 Pac. 679.

Garvey & Kelly, for respondent. The breach of the master's statutory duties in regard to this set screw was negligence *per se*. *Whelan v. Washington Lumber Co.*, 41 Wash. 153, 83 Pac. 98, 111 Am. St. 1006; *Hoveland v. Hall Bros. Marine R. etc. Co.*, 41 Wash. 164, 82 Pac. 1090; *Hansen v. Seattle Lumber Co.*, 41 Wash. 349, 83 Pac. 102; *Williams v. Ballard Lumber Co.*, 41 Wash. 338, 83 Pac. 323. Under the factory act a servant cannot be held guilty of contributory negligence in such a case as this, unless the injury was sustained through a negligent act of his own, and not solely by the dangers of the situation. *Hall v. West & Slade Mill Co.*, 39 Wash. 447, 81 Pac. 915; *Rector v. Bryant Lumber etc. Co.*, 41 Wash. 556, 84 Pac. 7. The instruction defining the burden of proof was proper. *Hart v. Niagara Fire Ins. Co.*, 9 Wash. 620, 38 Pac. 213, 27 L. R. A. 86; *Carstens v. Earles*, 26 Wash. 676, 67 Pac. 404.

GOSE, J.—The respondent, plaintiff below, is the widow of John Bush, deceased, who died on the 9th day of October, 1907, from an injury sustained on the 17th day of June of

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the same year. The complaint charged, in addition to the facts stated, that on the 17th day of June, 1907, and for some months prior thereto, the appellant was the owner of and engaged in operating a sawmill; that on the day stated the deceased was in its employ as a filer and oiler of the machinery and boxes on the upper deck of the mill; that there was a revolving shaft on the upper deck of the mill about nine feet from the main floor; that there was a collar attached to the shaft by means of an unguarded, projecting set screw; that the set screw could have been effectively guarded; that, while engaged in his regular employment, the clothing of the deceased was caught on the set screw; that the deceased was thrown to the main floor with such violence that his back was broken, resulting in his death on the date heretofore stated. The giving of the statutory notice of the injury was also alleged. The appellant pleaded affirmatively that the injury of the deceased was due to his own negligence, and that it was his duty to properly safeguard the machinery. The case was tried to the jury, which returned a general verdict for the respondent in the sum of \$3,200, and made the following special findings:

"Interrogatory 1. Was John Bush injured while stepping over the shaft and set screw on which his clothing was caught? Answer: The evidence did not show that he was injured while stepping over the shaft but it did show that he was caught by said set screw.

"Interrogatory 2. Did he know that the set screw was there, and that it projected? Answer: Yes.

"Interrogatory 3. Where was he going and what was he doing at the time he was caught by the set screw? Answer: The evidence did not show where he was going or what he was doing at the time he was caught by the set screw.

"Interrogatory 4. Was there a plank laid to the right looking north, of the timber for the boxing and end of the shaft, as shown in defendant's exhibit No. 4? Answer: Yes. One 8 inch plank.

"Interrogatory 5. If you find that at the time of the injury to John Bush there was a plank lying to the right,

looking north, of the timber for the boxing and end of the shaft as shown in defendant's exhibit No. 4, then state whether the plank or planks leading from the ladder to the platform of the canting gear were so placed that a person coming along them could step as safely and conveniently to the said plank lying to the right of the timber for the boxing and end of the shaft, as he could to the plank or planks lying to the left of the said timber and end of the shaft? Answer: No.

"Interrogatory 6. Do you find from the evidence that there was a guard or protection placed over the set screw complained of in this case, and that John Bush removed it and failed to replace it? Answer: No."

This appeal is taken from a judgment entered upon the general verdict. The evidence shows that the appellant had not complied with the factory act. Laws 1905, page 164.

The appellant, at the time of the injury, was operating a sawmill in a one and one-half story building. The principal machinery was on the lower floor. The canting gear was on the upper deck, and was operated by the sawyer at his post on the lower floor, by a rod attached to the line shaft on the upper deck. The end of the shaft rested on a timber about eight inches square. There was a collar attached to the shaft by a projecting set screw, about five-eighths of an inch in length. There was a pulley about thirty inches in diameter between the canting gear and the collar. The distance between the pulley and the set screw was about eleven and one-half inches. There was no floor on the upper deck. A ladder, extending from the main floor to the upper deck, afforded the only way of going from the one to the other. One of the duties of the deceased was to oil the boxing of the canting gear and the line shaft when the machinery was in operation. Just before the accident and while the machinery was in operation, the deceased took an oil can and ascended the ladder to the upper deck, presumably for the purpose of oiling the boxing. There were three eight-inch boards leading from the ladder to the line shaft, one of which passed

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to the right of the timber on which the shaft rested. The other two passed to the left side of the timber.

After the deceased had been thrown to the lower floor, the machinery was stopped and an investigation of the cause of the accident was made. The right leg of the deceased's overalls had been torn off, and was wound around the shaft at the point of the projecting set screw. There was a tear in the leg of the overalls, some ten or twelve inches from the bottom and toward the back part of the leg. The oil can was found a few feet from the set screw, in a slanting position, and a part of the oil had run out. No one saw any part of the accident except the falling of the body.

There were two ways of passing the boxing on the shaft to reach the canting gear; one by walking on the eight-inch plank and passing to the right of the east end of the shaft, then turning west to the canting gear. There was evidence tending to show that this way was impracticable, owing to the narrowness of the plank, and because there were scantling lying across it, and because the height of the ceiling made it necessary to go in a stooping posture. The other way was to walk on the two eight-inch planks and step over the shaft at the east side of the pulley. There was evidence tending to show that this was dangerous, because the shaft and set screw were raised about sixteen or eighteen inches above the plank, and also on account of the pulley, which was about eleven and one-half inches from the set screw. The evidence tended to show that both ways were used in going to the canting gear. The deceased at the time of the accident chose the latter way. The evidence tended to show that, when the latter way was used, the party crossing the shaft would take hold of a vertical rod, step over the shaft, turn to the left, and walk to the canting gear. This was the nearer way. The evidence clearly shows that a sunken or safety set screw without a head could have been used, and that there would have been no danger in stepping

over the shaft. This method was adopted shortly after the accident.

Numerous errors have been assigned, and the discussion has taken a wide range in the appellant's brief; but the view we take of the case will make it unnecessary to separately consider each of the assignments. It must be conceded that a sunken or a safety set screw could have been used, and that, if it had been used, there would have been no danger in stepping over the line shaft on the upper deck. The proximate cause of the injury—that is, the efficient cause without which the accident would not have occurred, was the failure of the appellant to use a sunken set screw.

The appellant first urges that the evidence does not show that the deceased was injured while in the performance of his duty. There is no force in this position. It is conceded that it was a part of his duty to oil the boxing on the canting gear and line shaft, and that he did so eight or ten times a day. We have seen that he ascended the ladder with the oil can in his hand, presumably for the purpose of discharging this duty. It was, therefore, a question of fact for the jury to determine whether he was engaged in the performance of his duty when he was injured.

It is next urged that the cause of the accident is so involved in doubt that there can be no recovery. An issuable fact may be proven by direct or circumstantial evidence, or by the two combined. We have seen, that it was the duty of the deceased to oil the boxing on the upper deck; that he did so eight or ten times each day; that he had gone to the upper deck with the oil can; that in order to reach the canting gear he had to pass the line shaft; that there was boxing on the line shaft which he was required to oil; that he was seen to fall with great velocity from the upper deck; that his back was broken from the violence of the fall; that his right trousers' leg had been torn from his body and was wound around the shaft at the set screw; that there was a rent in the cloth, showing that it had been caught in the set

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screw; that the oil can was found a few feet distant from the shaft, partially overturned; and that part of the oil had run out. The cause of the accident was therefore removed from the field of speculation, if doubt can be removed in this class of cases. The jury had no difficulty in determining the cause of the accident, and we do not feel disposed to either raise or adopt a doubt which would have no support in the evidence.

It is next contended that the deceased was employed as a millwright, and that, as such, it was his duty to safeguard the set screw. Numerous cases are cited in support of this contention. The position would be sound were it not for the fact that it finds no support in the evidence. It is true that one or two witnesses testified that he was the millwright and that such was his duty. However, the true relation of the deceased to the operation of the mill is shown by the testimony of Frank Isley, the foreman of the mill, who employed and instructed the deceased as to his duties. He testified as follows:

“Question: Did he [meaning the deceased] report to you if he was going to make any change or alteration of any kind? Would he consult with you at first about it? Answer: Yes, sir. Q. Why would he do that? A. To get my permission to do so.”

He further testified, that he knew of the unguarded condition of the set screw; that it was dangerous to pass between the pulley and the set screw; and that he never directed the deceased to protect it. It is true that he stated that a hood had been placed over the set screw before the deceased commenced work, and that the deceased had removed it. This testimony was contradicted by other witnesses, and we have seen that the jury found that the deceased did not remove it.

The appellant asked one Jackson, a witness, to state the duties of a millwright. An objection was sustained to this line of evidence, which is urged as error. The court perti-

nently remarked that what this man did was the proper inquiry. We have already shown, by an excerpt from the testimony of the foreman, that this line of evidence was immaterial. It was not important what were the duties of a millwright in other mills. The question was, what was the duty of the deceased in this mill. The evidence clearly shows that he filed the saws and oiled the machinery on the upper deck; that he could not make any change or alteration without the permission of the foreman, and that the latter knew of the defect which caused the injury, and did not direct it to be safeguarded. This case is, therefore, clearly distinguishable from *Woelflen v. Lewiston-Clarkston Co.*, 49 Wash. 405, 95 Pac. 493, and kindred cases.

The court gave the following instruction, to which error is assigned:

"Now, I want to make clear to you, if I can, this matter of burden of proof. If the testimony in a case were equally balanced, just as much testimony, credible testimony, on one side as on the other, then it is the duty of the court or jury to decide against the person who has the burden upon him, because by the burden means that he must show to the satisfaction, and if it is evenly balanced, then of course the person who has had the burden has not overcome that; so that when I say the burden of proof in the main case of showing that the deceased lost his life by being caught on a set screw that was unguarded, is upon the plaintiff, it means that they must make it out to your satisfaction or by a fair preponderance of the evidence; likewise, when I say the burden of proof of showing negligence upon his own part, which has proximately caused his death, is upon the defendant, they must make that out to your satisfaction, by a fair preponderance of the evidence."

The instruction is correct, under the rule announced in *Carstens v. Earles*, 26 Wash. 676, 67 Pac. 404, and *Hart v. Niagara Fire Ins. Co.*, 9 Wash. 620, 38 Pac. 213, 27 L. R. A. 86.

The appellant contends in his brief, and earnestly contended in the oral argument, that the deceased was guilty of

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contributory negligence, and that for this reason there should be a reversal of the judgment. It contends that the plank leading to the right of the shaft, to which reference has been made, afforded a safe way to reach the canting gear. The jury upon competent evidence has disposed of this contention. The only danger that could arise from walking on the two eight-inch planks leading to the left, and stepping over the shaft, was from the presence of the pulley and the set screw. The injury did not come from the pulley. Can it be said, as a matter of law, that it was negligence for the deceased to step over the set screw, which was elevated some sixteen or eighteen inches above the timbers upon which he was walking? We have seen that both ways were used by different persons in going to the canting gear, and that the projecting set screw was the only danger. It is true that the jury found that the deceased knew of the existence of the set screw. We have seen that the shaft containing the collar and set screw was placed upon a timber eight inches in width. There are two reasons why we cannot declare as a matter of law that it was negligence for the deceased to step over the set screw. The first is that, whilst injury might result therefrom, the act was not necessarily a negligent one. The other, and perhaps the stronger one, is that the law does not require a person engaged in the performance of duty to constantly keep his mind on some defective piece of machinery. To do so would place too great a burden on the human mind. In *Hall v. West & Slade Mill Co.*, 39 Wash. 447, 81 Pac. 915, the respondent's clothing was caught upon an unguarded set screw with which he came in contact in a moment of forgetfulness, while handling a heavy piece of timber between two parallel lines of rollers located about four feet apart. Speaking to the question of contributory negligence, at page 451, the court said:

"But it will hardly do to say that an employee is guilty of contributory negligence for merely working in a dangerous place when he does not assume the risk of injury for work-

ing therein. It is true that in such cases contributory negligence and assumption of risk approximate, and it is difficult to draw a line between them, but we think that, to convict an employee of contributory negligence for working in a place where he does not assume the risk of injury, it must be shown that he did not use care reasonably commensurate with the risk to avoid injurious consequences; in other words, that it was some negligent act of his own that caused his injury, and not alone the dangers of his situation."

In the *Hall* case the injured party testified that he came in contact with the ungarded machinery in a moment of forgetfulness, and in the instant case the injured party did not testify, but it was a legitimate and a reasonable inference that the jury had a right to deduce from the testimony, that the deceased did momentarily forget the existence of the set screw. Such inference is indeed strengthened because, as we have said, the act of stepping over was not necessarily negligent. See, also, *Rector v. Bryant Lumber etc. Co.*, 41 Wash. 556, 84 Pac. 7; *Erickson v. McNeeley & Co.*, 41 Wash. 509, 84 Pac. 8.

There was no error in the instruction that the testimony was conflicting upon certain points. It merely stated an actual fact. Nor did the court err in refusing to give the requested instructions. The instructions given in their entirety clearly stated the governing law. Other minor questions are suggested, which we have examined and conclude are without merit.

The judgment will be affirmed with costs to the respondent.

RUDKIN, C. J., and FULLERTON, J., concur.

CHADWICK, J. (concurring)—The risk was clearly assumed, and but for the factory act respondent could not recover. Upon the merits of the case, the only defense that could be set up is that of contributory negligence. This issue was resolved against appellant by the jury. I therefore concur in the result reached by Judge Gose.

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Statement of Case.

MORRIS, J. (concurring)—I concur solely upon the answers to the 1st and 3d interrogatories. If deceased was caught on the set screw while attempting to step over the shaft on his way to oil the canting gear, as contended for by appellant, I think he would be guilty of such contributory negligence as would bar a recovery. Such an act would not be the act of an ordinarily prudent man, and to my mind, reasonable minds could not differ in reaching a like conclusion. But the jury having specially found that the evidence did not show deceased was injured while stepping over the shaft, and that the evidence did not show where he was going, such finding is controlling, and I cannot interpose a contradictory finding and say he was caught while in the act of stepping over the shaft on his way to oil the canting gear. For this reason alone I concur.

[No. 8172. *En Banc*. Decided July 17, 1909.]

THE STATE OF WASHINGTON, *on the Relation of P. K. Mohr,*
Plaintiff, v. THE SUPERIOR COURT FOR KING COUNTY
*et al., Respondents.*¹

CERTIORARI—WHEN LIES—DENIAL OF TEMPORARY INJUNCTION—ADEQUATE REMEDY. Certiorari does not lie to review an order denying a temporary injunction, since it is not reviewable on appeal unless there is a finding that the parties against whom the injunction is sought are insolvent, under Bal. Code, § 6500, subd. 3, and there is an adequate remedy by appeal from the final judgment or by an action at law for damages.

CERTIORARI—WHEN LIES—STRIKING COMPLAINT—ADEQUATE REMEDY BY APPEAL. Certiorari will not lie to review an order striking an amended complaint, as it is not subject to review except on appeal from the final judgment.

Application filed in the supreme court July 6, 1909, for a writ of certiorari to review an order of the superior court

¹Reported in 103 Pac. 17.

for King county, Main, J., entered June 22, 1909, denying a temporary injunction; also, to review an order of said court, Ronald, J., entered June 29, 1909, striking an amended complaint, after hearings before the court. Writ denied.

Thomas B. McMahon, for relator.

Edwin H. Flueck, for respondents.

RUDKIN, C. J.—This is an original application for a writ of review to review an order of the superior court of King county denying a temporary injunction in an action instituted by the relator against the city of Seattle and others, and also to review an order of that court striking an amended complaint. There was no finding that the parties against whom the injunction was sought were insolvent, and no appeal from the order denying the temporary injunction would lie to this court, under subdivision 3 of § 6500, Bal. Code (P. C. § 1048). The relator bases his right to the writ largely upon that ground, but that question was fully considered by this court in *State ex rel. Young v. Superior Court*, 43 Wash. 34, 85 Pac. 989, where an injunction was sought against the city of Columbia. We there held that an order denying a temporary injunction was not subject to review in this court by appeal or otherwise, except in case of the insolvency of those against whom the injunction was sought. In the course of the opinion we said:

“Why did the legislature deny an appeal, except in cases of insolvency? It seems to us the reason is obvious. It was not because the legislature had already provided another method for the review of such orders, nor because it contemplated a different method of review in the future, but because it deemed an appeal from the final judgment, or an action at law for damages, an adequate remedy in such cases. In other words, it is plain to us that the legislature intended that such orders should not be subject to review in this court in any form, except on appeal from the final judgment. The power of this court to review interlocutory orders and the method of review are purely statutory, and when it is ap-

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Syllabus.

parent that the legislature intended that a particular order should not be subject to review here, we are entirely without jurisdiction in the premises."

An order striking an amended complaint is not a final order and is not subject to review in this court, except on appeal from the final judgment. The writ is therefore denied.

ALL CONCUR.

[No. 8045. Department Two. Decided July 17, 1909.]

BRADLEY ENGINEERING AND MACHINERY COMPANY,
Respondent, v. F. N. MUZZY, *Appellant*.¹

CHATTEL MORTGAGES — FORECLOSURE — DECREE — DEFICIENCY. The right to a deficiency judgment in an action to foreclose a chattel mortgage depends upon statute.

SAME — STATUTES — CONSTRUCTION. The legislature did not intend to merely regulate the procedure, by Laws 1899, p. 85, § 2, authorizing deficiency judgments upon the foreclosure of a mortgage if consented to in the agreement, and denying a deficiency judgment when stipulated against in the mortgage, and the same will not be construed as prohibiting deficiency judgments in foreclosures of mortgages which contain no stipulation as to deficiencies; since that would simply drive the creditor to two actions to recover the debt, a result that would have been provided in express terms and not left to implication.

STATUTES — IMPLIED REPEAL. A new law covering the whole subject-matter of an old one repeals the latter by implication, although not necessarily inconsistent in some matters.

STATUTES — TITLE — SUBJECT — SUFFICIENCY — MORTGAGES — DEFICIENCY JUDGMENTS — SALES UNDER EXECUTIONS. The title to an act relating to sales under execution and orders of sale and the confirmation of sheriff's sales and redemption therefrom, is not sufficiently broad to include the subject-matter of Laws 1899, p. 85, § 2, which provides for or against the taking of deficiency judgments in an action to foreclose a mortgage when consented to in the agreement, or when stipulated against in the mortgage, as the case may be, and that the commencement of an independent action shall be a waiver of the mortgage security.

¹Reported in 103 Pac. 37.

CHATTEL MORTGAGES—DECREE—DEFICIENCY JUDGMENT. Bal. Code, § 5880, expressly authorizes a deficiency judgment in an action to foreclose a chattel mortgage, where there is a separate obligation for the payment of the debt.

JUDGMENT—BAR—RES JUDICATA—MATTERS CONCLUDED. Where, in a chattel mortgage foreclosure, judgment for a deficiency upon a separate obligation for the debt is denied to the plaintiff, his remedy is by appeal from the judgment, which otherwise becomes *res judicata* and a bar to another action to recover any deficiency arising on a sale of the mortgaged property.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered January 14, 1909, upon findings in favor of the plaintiff, in an action to recover a deficiency upon a foreclosure sale, after a trial on the merits before the court without a jury. Reversed.

Munter & Lovejoy, for appellant.

B. B. Adams and *R. B. Blake*, for respondent.

RUDKIN, C. J.—On the 23d day of July, 1907, the defendant made, executed and delivered to the plaintiff his five certain promissory notes for the aggregated amount of \$1,936.26, payable on demand, with interest at the rate of eight per cent per annum from date until paid. At the same time, and for the purpose of securing the payment of said several promissory notes according to their terms, the defendant made, executed, and delivered to the plaintiff a chattel mortgage on certain personal property therein described. The notes and mortgage contained no agreement for a deficiency judgment in case of foreclosure, and no stipulation or agreement that a deficiency judgment should not be taken or that the mortgagee would look to the mortgaged property alone for the satisfaction of his claim.

On the 8th day of January, 1908, the plaintiff commenced an action in the superior court of Spokane county to foreclose this mortgage and for a deficiency judgment on the notes, and such proceedings were had in that action that, on the 26th day of May, 1908, judgment was given in favor

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of the plaintiff and against the defendant for the sum of \$1,936.26, with interest and costs of suit, including \$200 as attorney's fees, foreclosing the mortgage and for any deficiency that might remain after applying the proceeds of the sale of the mortgaged property to the satisfaction of the plaintiff's claim. Afterwards, on motion for a new trial, the court modified its decree by limiting the plaintiff to a foreclosure of its mortgage and a sale of the mortgaged property, and denying a judgment for any deficiency that might remain. Execution issued on the modified decree, and the mortgaged property was sold by the sheriff, leaving a deficiency of \$1,676.80 after applying the proceeds of the sale of the mortgaged property to the satisfaction of the plaintiff's demand.

The present action was instituted to recover this deficiency. To this action the defendant interposed two affirmative defenses; first, that the plaintiff was not entitled to a deficiency judgment because its notes and mortgage contained no agreement for such a judgment; and second, that the judgment in the original action foreclosing the mortgage and denying a deficiency judgment was a bar to the present action. The court below held against both of these defenses and gave judgment for the deficiency according to the prayer of the complaint. From this judgment the present appeal is prosecuted.

The two questions presented by the affirmative defenses are, first, Is the respondent entitled to a deficiency judgment under the facts disclosed by this record? and second, if so, should such judgment have been entered in the original action to foreclose the mortgage? The answer to the second question must be found in our statutes, for the general rule is that a court of equity has no power to enter a deficiency judgment in an action to foreclose a mortgage, unless authorized so to do by statute or rule of court. 9 Ency. Plead. & Prac., p. 451 *et seq.* The statutory provisions determining the right of the respondent to a judgment for a deficiency after

subjecting the proceeds of the sale of the mortgaged property to the satisfaction of its demand, and the procedure by which such judgment shall be obtained, are the following: Bal. Code, § 5880 (P. C. § 1284), relating to the foreclosure of chattel mortgages, provides that,

“The mortgagee or holder of the lien may proceed upon his mortgage or lien, [or] if there be a separate obligation in writing to pay the same secured by said mortgage or lien, he may bring suit upon such separate promise. When he proceeds on the mortgage, if there be a specific agreement therein contained for the payment of a certain sum, or there is a separate obligation for the said sum, in addition to a decree of sale of mortgaged property, judgment shall be rendered for the amount due upon said mortgage or other instrument, the payment of which is thereby secured. The decree shall direct the sale of the mortgaged property, and if the proceeds of sale be insufficient under the execution, the sheriff is authorized to levy upon and sell other property of the mortgage debtor, not exempt from execution, for the sum remaining unsatisfied.”

Section 5888 (P. C. § 1277), relating to the foreclosure of mortgages on real estate contains similar provisions. Section 1 of the act of March 11, 1897, Laws 1897, p. 98, provides:

“That in all proceedings for the foreclosure of mortgages hereafter executed, or on judgments rendered upon the debts thereby secured, the mortgagee or assignee shall be limited to the property included in the mortgage.”

This act was declared unconstitutional by this court in the case of *Dennis v. Moses*, 18 Wash. 537, 52 Pac. 333, 40 L. R. A. 302, and need not be further considered.

Section 2 of the act of March 8, 1899, Laws of 1899, p. 85, provided that:

“When there is an agreement of the judgment debtor for the payment of any sum of money secured by a mortgage or other lien, and a deficiency judgment is consented to in said agreement, the court may direct in the decree that the balance due and costs which may remain unsatisfied after the

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sale of the property shall be satisfied from any property of the judgment debtor, and if any part of the judgment, interest and costs remains unsatisfied, the sheriff shall forthwith proceed to levy upon any property of the judgment debtor not exempt from execution, and all subsequent proceedings under said execution shall conform to the provisions of this act. The judgment creditor may also obtain from the clerk of the court execution or executions in the ordinary form for such deficiency: *Provided*, That in case of mortgage foreclosure where the mortgage contains a stipulation that no deficiency judgment shall be taken against the mortgagor, but that the mortgagee shall look to the mortgaged premises for satisfaction of his claim, no deficiency judgment shall be allowed. The commencement of an action for the recovery of a debt secured by mortgage not asking a foreclosure of the mortgage and brought before a foreclosure of the mortgage and sale thereunder, shall be, and be deemed to be, a waiver of the mortgage security; and this provision may not be waived or avoided by agreement contained in the mortgage or otherwise."

This latter section is plain in so far as it speaks, but its silence is enigmatic. It authorizes a deficiency judgment when stipulated for in the mortgage, it denies a deficiency judgment when stipulated against in the mortgage, but where the mortgage is silent the statute is also silent. Under his first affirmative defense, the appellant contends that this section prohibits deficiency judgments in all cases, unless expressly stipulated for in the mortgage, and the section is perhaps as susceptible to that construction as any other. The respondent, on the other hand, contends that the mortgagee is entitled to a deficiency judgment in the foreclosure action if so stipulated in the mortgage, but otherwise is relegated to an independent action at law to recover the deficiency. If this construction be adopted, the statute relates merely to a matter of procedure, and its only effect is to drive the creditor to two actions to recover his debt. We cannot believe that such was the legislative intent. A similar contention was made before this court in *Dennis v. Moses*, *supra*, where the

validity of the act prohibiting deficiency judgments was involved, but in answer to the contention the court said:

"The discussions in some of the briefs view the act as prescribing a method of procedure. Looking only to the title of the act and the older and later practice relating to the foreclosure of mortgages, this would in a measure be justified. If it could be held to apply to a matter of practice only and to prohibit deficiency judgments in actions to foreclose mortgages, and the right remains intact to enforce collection of the deficiency in a subsequent suit or to waive the security in the first instance and bring an ordinary action where there is a covenant to pay in the mortgage or a separate instrument contracting to pay, then the question comes up, what measure of public policy can it serve to prohibit a waiver? All agree that if it is a matter of public policy it cannot be waived by the parties; if a matter of private concern, it may be. It would be hard to conceive of any public interest that would be promoted in requiring a debtor to be subjected to the costs of two actions. The cases mentioned in 2 Jones on Mortgages, Sec. 1711, as to some states, would not apply here as such distinctions between the practice in equity and at law have been abolished for a long period, and it can hardly be supposed it was intended to take such a decisive step backwards and deprive the court of such power and compel a resort to the old common law procedure in this particular. It would be entirely foreign to the whole history and spirit of our jurisprudence. Consequently, if the power to enforce collection of a deficiency exists, the act as a method of procedure must be intended to confer a private benefit only, and its provisions can be waived. As limiting the method of procedure it is clearly worse than useless."

With this language fresh in mind, it seems to us that if the legislature of 1899 simply intended to regulate the procedure in mortgage foreclosures it would have said so in express terms, and not leave the matter to implication or construction. The act of 1897 was as susceptible to the construction contended for as is the act of 1899. What if any effect has § 2 of the act of 1899 upon § 5880, Bal. Code (P. C. § 1284), and other similar provisions contained in the code of civil procedure? The later act is either cumulative or it supersedes

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the earlier laws on the same subject. Undoubtedly the general rule is that where a new law covers the whole subject-matter of an old one the old law is repealed by implication, though there may be some matters in the old law which are not necessarily obnoxious to any provision in the new. *Mansfield v. First Nat. Bank*, 5 Wash. 665, 32 Pac. 789, 999; *Seattle v. Clark*, 28 Wash. 717, 69 Pac. 407. Within this rule the act of 1899 would perhaps supersede Bal. Code, § 5880 (P. C. § 1284), and other like sections in the old law. To hold that the act of 1899 is merely cumulative would be to deny to it any effect whatever; for under earlier laws the mortgagee was entitled to a deficiency judgment where contracted for, and we apprehend was not entitled to a deficiency judgment where he agreed not to take one, or to look exclusively to his mortgage security.

If § 2 of the act of 1899 was intended to supersede and repeal § 5880 and other like provisions in earlier statutes, is it a constitutional enactment? Section 19, of art. 2, of the Constitution, declares that, "No bill shall embrace more than one subject which shall be expressed in the title." Is the subject-matter under consideration expressed in the title of the act, which reads as follows:

"An Act relating to the sales of property under execution, decrees, and orders of sale, and the confirmation of sheriff's sales, and redemption therefrom, and repealing an act passed by the legislature of the State of Washington March 2, 1897, approved March 10, 1897, entitled 'An act relating to the sale of property under execution and decrees, and the confirmations of sheriff's sales, and repealing sections 511, 512, 513, 514, 515, 516, 517, 518, 519, 520 and 521 of Vol. 2 of Hill's Annotated Statutes and Codes of the State of Washington, relating to the redemption of real estate sold on decrees of foreclosure and on execution' and declaring an emergency."

What is there in this title to indicate a purpose on the part of the legislature to legislate upon contract rights or upon matters of procedure? The title of the act is expressly

limited to execution sales, their confirmation and the right of redemption therefrom, and what has § 2 to do with these subjects? Absolutely nothing. Its subject-matter is as foreign to execution sales, their confirmation and redemptions therefrom as is the subject-matter of Bal. Code, §§ 5880 and 5888, which it is claimed are repealed thereby. In speaking of the title to legislative acts in his work on Constitutional Limitations, p. 178, Judge Cooley says:

“As the legislature may make the title to an act as restrictive as they please, it is obvious that they may sometimes so frame it as to preclude many matters being included in the act which might with entire propriety have been embraced in one enactment with the matters indicated by the title, but which must now be excluded because the title has been made unnecessarily restrictive. The courts cannot enlarge the scope of the title; they are vested with no dispensing power; the constitution has made the title the conclusive index to the legislative intent as to what shall have operation; it is no answer to say that the title might have been made more comprehensive, if in fact the legislature has not seen fit to make it so. Thus, ‘an act concerning promissory notes and bills of exchange’ provided that all promissory notes, bills of exchange, or other instruments in writing, for the payment of money, or for the delivery of specific articles, or to convey property, or to perform any other stipulation therein mentioned, should be negotiable, and assignees of the same might sue thereon in their own names. It was held that this act was void, as to all the instruments mentioned therein except promissory notes and bills of exchange; though it is obvious that it would have been easy to frame a title to the act which would have embraced them all, and which would have been unobjectionable. It has also been held that an act for the preservation of the Muskeon River Improvement could not lawfully provide for the levy and collection of tolls for the payment of the expense of *constructing* the improvement, as the operation of the act was carefully limited by its title to the future. So also it has been held that ‘an act to limit the numbers of grand jurors, and to point out the mode of their selection, defining their jurisdiction, and repealing all laws inconsistent therewith,’ could not constitutionally contain provisions which should authorize a defendant in a criminal case,

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on a trial for any offense, to be found guilty of any lesser offense necessarily included therein. These cases must suffice upon this point; though the cases before referred to will furnish many similar illustrations."

See, also, *Percival v. Cowychee Wide Hollow Irr. Dist.*, 15 Wash. 480, 46 Pac. 1085; *Anderson v. Whatcom County*, 15 Wash. 47, 45 Pac. 665, 33 L. R. A. 137; *Howlett v. Cheetham*, 17 Wash. 626, 50 Pac. 522; *State ex rel. Henry v. Macdonald*, 25 Wash. 122, 64 Pac. 912; *Armour & Co. v. Western Construction Co.*, 36 Wash. 529, 78 Pac. 1106; *State ex rel. Nettleton v. Case*, 39 Wash. 177, 81 Pac. 554, 109 Am. St. 874, 1 L. R. A. (N. S.) 152; *State v. Clark*, 43 Wash. 664, 86 Pac. 1067.

For these reasons, we are of the opinion that Bal. Code, § 5880, is in no manner affected by § 2 of the act of 1899, and that the respondent was entitled to its deficiency judgment in the original foreclosure action under the provisions of that section. Such having been its right, its remedy was by appeal from the judgment denying a deficiency judgment, and not by the prosecution of another and independent action.

As said by the court in *Kenyon v. Wilson*, 78 Iowa 408, 43 N. W. 227:

"II. It is plain that the identical relief—a personal judgment against defendants—sought in these actions could have been recovered in the original foreclosure proceeding. If defendants were liable for the conversion of the property, a decree could have been entered requiring them to surrender it in execution; and, upon failure, execution could have issued against them for the value of the property. In case defendants had disposed of the property before judgment, the decree could have so provided that the execution should issue at once. There can be no doubt that plaintiff could have had full and adequate relief in the original action for the deprivation of any right which he did suffer or would suffer by reason of the appropriation of the mortgaged property to his own use.

"III. An adjudication is final and conclusive of all matters in a case which the parties could have presented to the court for adjudication in the case. The law hates a multiplicity of suits, and will not permit a plaintiff to split up

his demands, presenting one at a time, in separate successive actions. He must litigate all matters growing out of his causes of action upon which a remedy may be sought in one action. Thus he cannot seek a foreclosure of a mortgage in one action, and in a subsequent action ask for a personal judgment against the defendant. He could have recovered both remedies in the first action, and must be content with what he first recovers."

See, also, *Bunch v. Pierce County*, 53 Wash. 298, 101 Pac. 874.

The judgment in the foreclosure action is, therefore, *res adjudicata*, and the judgment in this action must be reversed with directions to dismiss the action. It is so ordered.

CROW, PARKER, and DUNBAR, JJ., concur.

[No. 7605. Decided July 17, 1909.]

JOSEPH WEST *et al.*, Plaintiffs and Appellants, v.
L. B. CARTER *et al.*, Defendants and
Appellants.¹

VENDOR AND PURCHASER—REMEDIES OF VENDEE—DAMAGES FOR FALSE REPRESENTATIONS. A vendee induced to purchase land by false representations made by the vendor's agents in pointing out the boundaries, may recover his damages from the agents, although the representations were not known to be false nor wilfully made.

SAME—MEASURE OF DAMAGES. The measure of damages for false representations as to the boundaries of lands sold, where the vendees elect to keep the property, is the difference between the actual value of the property transferred at the time of the sale, and what the value would have been if the representations had been true, giving the vendees the benefit of their bargain (RUDKIN, C. J., and MOUNT, J., dissenting).

SAME—REPRESENTATIONS BY AGENTS—WHEN ACTIONABLE. Representations by agents in the sale of land as to the owner's representations regarding his boundaries, constitute actionable fraud on the part of the agents, where the boundaries are thereby falsely described to the purchaser, to his damage, and the agents schemed to prevent the parties from coming together.

¹Reported in 103 Pac. 21.

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Cross-appeals from a judgment of the superior court for San Juan county, Joiner, J., entered January 8, 1908, upon findings of the court, after a trial without a jury, awarding damages to the plaintiffs for false representations upon the sale of land. Reversed upon plaintiffs' appeal.

Frederick R. Burch and John A. Saboe, for plaintiffs.

T. D. J. Healy and J. J. Noethe, for defendants.

DUNBAR, J.—This is an action for damages for false representations as to the boundaries of land sold by the defendants to the plaintiffs. The findings of fact made by the court were, substantially, as follows: That the plaintiffs, Joseph West and Eva West, were husband and wife; that defendants Carter, Newhall, and Garrett were associated together in a partnership known as the "San Juan Land Company," a company organized for the purpose of buying and selling real property; that one A. J. Armstrong and Emma Armstrong, his wife, resided on, and were the owners of, certain real property situate in San Juan county; that the said San Juan Land Company had the sole and exclusive right of sale of said real and personal property for the period of thirty days for the price of \$1,450; that on or about December 24, 1906, the plaintiffs came from Wenatchee, Washington, to the town of Friday Harbor, for the purpose of looking over the country with a view to purchasing land; that they came to the home of William and Cora Lee, who were old acquaintances of the plaintiffs; that the visit of the said Wests to the Lees continued for the period of about one week, during which time the Lees advised West concerning certain premises; that the Lees described to the plaintiffs the property of the Armstrongs before mentioned, and offered to show them the same; that upon the next morning Lee informed the plaintiffs that he would have to drive them down to Friday Harbor to see Mr. Garrett (meaning W. R. Garrett, manager of the San Juan Land Company) and find out whether or not the place was still for sale; that the said Lee and the Wests drove to

Friday Harbor, and Lee went to the office of W. R. Garrett and ascertained that the said place was still for sale, which fact he reported to the Wests, and also that Mr. Garrett was unable to go out with them, but that he (Lee) knew as much about it as Garrett, and he thereupon drove the Wests to the Armstrong place; that, at the time said plaintiffs and Lee went out to view said property, the defendant Carter, at the request of the defendant Garrett, called Armstrong on the rural telephone and told him (Armstrong) to come immediately to town; that Armstrong was called to town as aforesaid for the express purpose of keeping the plaintiffs and Armstrong from meeting, in order that said company's prospective commissions might not be jeopardized, and that the plaintiffs and Armstrong never did meet in connection with the viewing or selling of said premises; that Lee took the plaintiffs to the Armstrong place and pointed out the west, north, and south boundary lines, which were substantially correct.

In pointing out the east line to plaintiffs, Lee informed them that Armstrong told him that it was on the line of a certain fence, which fence made the tract pointed out as the Armstrong forty include eighteen acres on the west not belonging to said forty-acre tract or to said Armstrong; that said eighteen-acre tract was covered by two and one-half acres of stubble field, about twelve acres of slashing, and the balance rough and uncleared land; that upon the return of plaintiffs and Lee to the office of defendant Garrett, and before any contract of purchase was made, in speaking with reference to said last line of said Armstrong forty, Garrett informed plaintiffs that Armstrong told him that the stubble field and most of the slashing was included; that Lee and Garrett each in making the statement as to the eastern boundary of the Armstrong forty did so believing said statements to be true and without any intent to deceive or defraud the plaintiffs, or either of them; that thereafter on the 30th day of December, 1906, plaintiffs, relying wholly upon the state-

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ments of Lee and Garrett as to the boundaries of the Armstrong forty, and believing said statements to be true, and having no reason to believe otherwise, through the defendant Land Company, as the agent of said owners, agreed to purchase the said real and personal property for the sum of \$1,650, providing they could raise the money therefor; whereupon Garrett, for and on behalf of the San Juan Land Company, agreed to hold said property a few days for them; that it was further understood and agreed, in case the plaintiffs were able to raise the money to conclude the purchase, that they should send it to either Garrett or Lee; that the plaintiffs returned to the house of Lee, where they stayed that night, and the next day departed for their home at Wenatchee; that on or about the 18th day of January, 1907, plaintiffs sent to Lee the sum of \$500 to be applied in payment upon said property under the arrangements made with Garrett; that thereafter, to wit, on the 19th day of January, 1907, Lee took a contract of sale to himself from Armstrong for the real and personal property described, for the sum of \$1,505, under the following terms: \$100 cash; \$400 upon the approval of abstract, and the remainder in stated installments; that thereafter the money was paid to the Armstrongs and deed taken in the name of L. B. Carter; that thereafter, about the 1st of February, 1907, plaintiffs again arrived in Friday Harbor from Wenatchee, and were informed of the status of the transaction and purchase of the land by the San Juan Company, and Carter then executed and delivered to the Wests a bill of sale of the personal property and deed of conveyance to the tract of land above described; which said conveyance did not include the said eighteen-acre tract of land composed of the stubble field and alder slashing and the three and one-half acres of rough and uncleared land mentioned above; and the plaintiffs paid the land company the sum of \$1,650, the agreed purchase price; that after closing said purchase the plaintiffs went to the home of the Lees, where they remained until February 10, when they

drove over to the Armstrong property and were told by Armstrong that they had been misinformed as to the lines of said place, and the proper boundaries were pointed out to them.

The plaintiffs elected to retain the land, and sued for damages. The court further found: That the reasonable value of the real estate excluding the eighteen acres was \$950, and that the personal property was of the reasonable value of \$550; that the land described, including the eighteen acres of slashing and stubble, etc., pointed out to the said Wests as part of the Armstrong premises, was reasonably worth the sum of \$1,580; that the land pointed out to the Wests, together with the personal property which was transferred to them as a part of the transaction, was of the reasonable value of \$2,130; that by reason of the statements made to plaintiffs by Lee and Garrett as to the location of the west boundary line of the Armstrong forty, and the purchase by plaintiffs of the said real and personal property, and by reason of and wholly relying upon said representations and believing the same to be true, and having no reason to believe otherwise, the plaintiffs were damaged in the sum of \$150, and judgment was entered for that amount. Both parties have appealed.

The court awarded to the plaintiffs as their measure of damages the difference between the amount which they actually paid and the actual value of the land as found; while it is the contention of the plaintiffs that the proper measure of damages was the difference between the amount paid and the amount represented to be the value of the land, or the difference between the amount paid and the value of the land as it would have been if the land represented to have been sold had been actually sold. In other words, the question to be determined is whether, conceding the misrepresentations, the plaintiffs are entitled to the benefit of their bargain. The defendants insist, that the action should have been dismissed because no false representations were made by defendants; that the complaint shows that the basis of plaintiffs' case is

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fraud or deceit consisting of the alleged misrepresentations of boundary lines, which alleged misrepresentations were false and fraudulent; that the record nowhere discloses the fact that the representations made as to the boundary lines were false, and that unless the representations were false the plaintiffs' action must fall. The affirmative contention of the plaintiffs in relation to maintaining this kind of an action has been disposed of by this court in *Hanson v. Tompkins*, 2 Wash. 508, 27 Pac. 73, where it was held that, if the defendants relied upon the representations of the plaintiff, and were led to believe by such representations that the lot contained 36½ acres, when in fact it contained but 26½ acres, and were induced by such representations to purchase such lot as a lot of 36½ acres, it made no difference whether plaintiff knew such representations to be false or not; that he was liable for damages naturally flowing from such misrepresentations. The same rule was announced in *Sears v. Stinson*, 3 Wash. 615, 29 Pac. 205, where it was said:

"There can be no difference in principle, so far as maintaining any distinction between cases where the mistake was willful and where it was innocent, . . ."

Those cases were reviewed in *Lawson v. Vernon*, 38 Wash. 422, 80 Pac. 559, 107 Am. St. 880. In that case the following instruction was alleged as error:

"If you find from the evidence, as a matter of fact, that prior to the date of sale the defendant Vernon pointed out certain lands to one of the plaintiffs which were not as a matter of fact the lots conveyed, and that plaintiffs believed they were the same lands, and were told by the said Vernon, that they were the same lands, that plaintiffs are entitled to recover any damages which they sustained by reason of such misinformation, even if the said Vernon did not purposely mislead them, in other words, if the defendant Vernon made a mistake and pointed out the wrong property, even if his mistake were unintentional, yet he and his partner must be held for any pecuniary damage said mistake may have caused the plaintiff."

This instruction was sustained by this court, the court stating in the course of the opinion that:

"The prevailing doctrine is that, if a person states as true, as of his own knowledge, material facts susceptible of knowledge, to one who relies and acts thereon to his injury, he cannot defeat recovery by showing that he did not know that his representations were false, or that he believed them to be true;"

citing *Cottrill v. Krum*, 100 Mo. 397, 13 S. W. 753, 18 Am. St. 549, and *Sutherland*, *Damages* (3d ed.), 1169. The court noticed the claim of the appellants in that case, as it is made in this, that a different doctrine was announced by this court in the case of *Northwestern S. S. Co. v. Dexter Horton & Co.*, 29 Wash. 565, 70 Pac. 59, and undertook to distinguish that case, from the fact that the opinion in that case pointed out that in the earlier cases the representations involved only questions of fact, while the representations in the latter, being as to the solvency of a person, necessarily involved opinion, as the question of solvency or insolvency of a person cannot ordinarily be subjected to precise facts. In any event, there was no expressed intention in that case to overrule the decisions in *Hanson v. Tompkins*, and *Sears v. Stinson*, *supra*, and the case of *Lawson v. Vernon* has undoubtedly become the established law of this state in that regard.

And this is the just theory, for the result to the party who is deceived is exactly the same whether the intention of the party upon whose representations he relied was fraudulent or not. If one by misrepresentation, even though innocent, is the cause of damage and injury, it would certainly be inequitable to visit that damage and injury upon the head of one who was in no way to blame, rather than upon the one who was the cause of such damage or injury. Under all the authorities, it was the right of the plaintiffs in this action, either to bring an action for rescission, or to retain the land and seek their remedy in damages. So that the sole question in the case is the measure of damages, the appeal being taken

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from the conclusions of law, the contention being that they were not justified by the findings of fact, and there being no controversy over the facts.

It is said in 20 Cyc. 132, under the title, Fraud on purchaser and difference between actual and represented value:

"It has been frequently laid down that in an action based on fraud in the sale or exchange of property, if plaintiff retains the title and does not offer to rescind, the measure of damages is the difference between the actual value of the property at the time of the sale or exchange and what it would have been worth had it been as represented, or what its value was represented to be, and that this measure of damages applies without regard to the price paid or the value of the property given in exchange by the party defrauded, for it cannot always be said that plaintiff has suffered no injury because the bargain induced by the fraud was not a bad one and he has received the worth of his money. Plaintiff's right of recovery is determined by the position which he would have occupied had there been no fraud, and he is entitled to the benefit of his bargain on this basis."

The object of all rules in regard to the measure of damages is to permit such damages as naturally flow from the fraud or misrepresentation in the transaction. As was said by this court in *Lawson v. Vernon*, *supra*

"In this case as in all others, the recovery should be commensurate with the injury; that is to say, the guilty party is to be charged with such damages as have naturally and proximately resulted from his wrongful act. In cases like the one at bar, these cannot be measured by the excess in value of the lots pointed out over those actually conveyed. This is doubtless one element of damage where the fact assumed exists, but it may be and usually is, the least of the damages suffered by the person injured."

In this case it may well be presumed that the fact that the plaintiffs thought they were obtaining this eighteen acres of land which they specially noticed and which was more valuable than the other land, was the principal reason for their making the trade which they did make and for changing their

location from one part of the country to the other. It is no more than right that all these matters should be taken into consideration in measuring their damages, and they cannot be taken into consideration if the hard rule announced by the court is adopted.

"By the great weight of authority, in ordinary cases, the proper measure of damages in such a case, where the purchaser retains the property, is the difference between the actual value of the property at the time of the sale and what its value would have been if the representations had been true, for the purchaser is entitled to the full benefits of his bargain. This is clearly the more reasonable doctrine." 14 Am. & Eng. Ency. Law (2d ed.), p. 182.

"It is now well settled that, in actions for deceit or breach of warranty in sales, of personalty or realty, the measure of damages is the difference between the actual value of the property at the time of the purchase, and its value if the property had been what it was represented or warranted to be. The price paid for the property is strong but not conclusive evidence of its value, as it was represented to be." Bigelow, Law of Frauds, p. 627.

"This seems to be the proper place for considering the measure of damages in actions for fraud committed in the course of a sale of land. In such actions, as in actions for fraud in the sale of chattels, it has usually been held that the measure of damages is the difference between the land as it would have been if as represented and as it actually was." 3 Sedgwick, Damages, § 1027.

"In an action for fraud in inducing the plaintiff to part with his interest in land under the mistaken belief, brought about by the defendant's representations, that he owned only a life estate, the measure of damages is the difference between the value of the actual title conveyed and the value of the title which defendants represented to exist and which the plaintiff believed he conveyed." *Hicks v. Deemer*, 187 Ill. 164, 58 N. E. 252.

"The rule for the estimation of damages resulting from fraudulent representations in the sale of both real and personal property is the same. It is to ascertain the difference between the value of the property as it actually existed on the

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day of sale, and the value as it was represented to be." *Herfort v. Cramer*, 7 Colo. 488.

And without further specifying, while there are some cases—most of them old cases—which sustain the rule contended for by the defendants, the great weight of authority sustains the rule that we have announced; and as we have before seen, there can be no reason for making any distinction so far as the measure of damages is concerned, between cases where the representations are actually fraudulent and where they are made through mistake.

It is contended by the defendants, that these representations were representations of representations; that the findings of fact show that the purchasers were simply told that the line was represented by the seller to be there. But under all the circumstances of the case, and considering the fact that a plot or scheme was entered into and carried out to prevent the coming together of the purchasers and the seller of these lands, so that these matters could naturally be adjusted and understood between them, we think the agents should be bound by the representations which they made as to the boundary lines of the lands sold by them.

The judgment will be reversed and the cause remanded with instructions to enter a judgment in favor of the plaintiffs, Joseph West and Eva West, against the defendants, for the sum of \$630.

FULLERTON, CROW, MORRIS, and CHADWICK, JJ., concur.
RUDKIN, C. J., dissents.

MOUNT, J. (dissenting)—I agree to the rules as stated in the majority opinion, but I cannot assent to the conclusion that the plaintiffs were damaged in the sum of \$650. The total value of the property which plaintiffs intended to purchase, as found by the court, was \$2,130. The price paid was \$1,650. The difference was \$480, which represents the whole damage under the rule stated. The fallacy of the conclusion of the majority is readily seen by applying the rule

as stated. It is also seen by the following considerations: If plaintiffs had rescinded the contract, as they had a right to do, they would have been required to return the whole property to the defendants and receive their money back, \$1,650. Instead of rescinding the contract, they chose to keep the live stock valued at \$550, and forty acres of land valued at \$950, or a total value of \$1,500. It must be assumed that the plaintiffs had paid, or were willing to pay, this value for the property which they retained. The trial court found that the eighteen acres of land, which was not conveyed, because it was not owned by the vendors, was of the value of \$630. There must have been some consideration for the purchase of this tract of land. That consideration necessarily must have been at least the difference between \$1,500, the value of the property retained by the plaintiffs, and the price paid, viz., \$1,650, which difference is \$150. This was the amount which plaintiffs paid in excess of the value of the property they received. The difference between the property received and what they intended to purchase was \$630, for which they paid at least \$150. They were, therefore, damaged in the difference, or \$480. The result reached by the majority, in effect, says that no part of the consideration was paid for the eighteen-acre tract, and that all the profits of the purchase rested in this tract, which, of course, is not correct either in theory or usual dealing. I therefore think the judgment should be for the sum of \$480 instead of \$630.

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Opinion Per PARKER, J.

[No. 7896. Department Two. Decided July 17, 1909.]

WEST COAST MANUFACTURERS' AGENCY, *Respondent*, v.
OREGON CONDENSED MILK COMPANY, *Appellant*.¹

FACTORS—SALES ON COMMISSION—CONTRACT—CONSTRUCTION. Under a contract for the sale of defendant's goods on commission, which fixed the plaintiff's compensation at a certain sum for every case "actually sold, delivered and paid for," nothing to be paid until the money shall be received by the defendant from the purchasers, the plaintiff was not entitled to commissions on orders taken and not filled at the time of the termination of the agreement.

DAMAGES—LIQUIDATED DAMAGES—CONTRACTS—CONSTRUCTION—TERMINATION. Where a manufacturer's agency contract for the exclusive sale of defendant's goods fixed plaintiff's compensation at a certain sum for every case "actually sold, delivered and paid for," nothing to be paid until the money shall be received by the defendant, a provision in the contract that, in case of a sale of its manufacturing plant the defendant shall be absolved from any damage or liability by reason of the termination of, or failure to carry out, the contract, except \$500 as stipulated damages, includes loss of commission on unfilled orders for goods sold by the agent before the sale of the plant, which the defendant thereafter refused to deliver, the measure of plaintiff's damage by reason of defendant's refusal to deliver goods ordered before termination of the contract being included in the \$500 stipulated for.

Appeal from a judgment of the superior court for King county, Walter B. Beals, Esq., judge *pro tempore*, entered September 18, 1908, upon findings in favor of the plaintiff, in an action on contract, after a trial before the court without a jury. Reversed.

Weter & Roberts, for appellant.

M. M. Lyter (*H. D. Folsom, Jr.*, of counsel), for respondent.

PARKER, J.—This is an action to recover commissions and liquidated damages upon the termination of a commission contract entered into between the parties. The cause was tried by the court without a jury, when findings of fact and

¹Reported in 103 Pac. 4.

conclusions of law were made and judgment rendered thereon favorable to plaintiff, from which the defendant appealed to this court.

No exceptions were taken to the findings of fact, the only contention being upon the conclusions of law, to which the appellant duly excepted. The contract is set out at length in the findings, and its provisions, so far as necessary to be noticed in our determination of the respective rights of the parties, are as follows:

"This article of agreement, made and entered into this 2nd day of July, 1906, by and between the Oregon Condensed Milk Company, a corporation formed, organized and existing under and by virtue of the general incorporation laws of the State of Oregon, doing business at Hillsboro, Oregon, party of the first part, and the West Coast Manufacturers' Agency, a corporation formed, organized and existing under and by virtue of the general incorporation laws of the State of Washington, with its principal office at Seattle, Washington, party of the second part, witnesseth:

"That whereas the party of the first part is the manufacturer of evaporated cream, manufactured, packed and sold under labels known as Oregon Grape and Pacific; and

"Whereas the party of the second part is doing business in the State of Washington, State of Oregon, and Territory of Alaska as a manufacturers' agent:

"Now, therefore, this agreement witnesseth: That the party of the first part does hereby give and grant to the said party of the second part the agency for the sale of Oregon Grape and Pacific creams, and such other brands as may be hereafter manufactured and placed upon the market by the said party of the first part, in Western Washington, State of Oregon and Territory of Alaska, for a period of five years from the date of this contract, subject to the conditions and agreements and compensations hereinafter set forth and provided.

"RETAIL TRADE. The party of the second part undertakes and agrees to sell said brands of cream in the State of Oregon, Territory of Alaska and Western Washington, direct to the retail trade; to maintain a depot at Seattle, and a depot at Portland; to work the retail trade of said states and said territory thoroughly, keeping not less than two travel-

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ing salesmen employed in Western Washington and not less than one traveling salesman constantly in the State of Oregon, and to use its best efforts to secure sales of cream in the Territory of Alaska during the whole of said period of five years.

"The party of the second part further undertakes and agrees to do all billing of cream so sold in triplicate, the original invoice to be delivered to the purchaser, the duplicate to be returned to the party of the first part, and the triplicate to be retained by the party of the second part, all such cream so sold by the party of the second part to be delivered from its depot or from the factory of the party of the first part or from railroad yards or other points more accessible.

"COMPENSATION. The party of the first part undertakes and agrees to pay to party of the second part as compensation for the sale of its products in Western Washington, State of Oregon and Territory of Alaska, twenty cents per case for every case of cream actually sold, delivered and actually paid for, by whomsoever sold, during the time this contract is in force and effect, said twenty cents per case to be paid to the party of the second part between the first and tenth of each month and be computed from the cash book of the party of the first part on moneys received from sales of said cream in said territory hereinbefore mentioned for the month previous (but no amount shall be paid upon any sales so made until the money shall be received by the party of the first part from the purchaser of said cream). . . .

"STORAGE. It is further understood and agreed that the party of the second part shall maintain said depots during said period of five years and shall store all necessary stocks of cream free of charge, . . .

"COLLECTIONS. It is further understood and agreed between the parties to this contract that the party of the second part, its officers and agents, shall make every effort and lend every assistance toward the collections of all accounts in the territory herein specified, . . .

"SALE. It is further distinctly understood and agreed between the parties to this contract that in the event the party of the first part shall sell its factory, in that event the party of the first part shall use its best endeavors to require the purchaser to assume this contract and the fulfillment of its terms, but in the event the party of the first part is unable

to require the purchaser to assume this contract, in that event the party of the first part shall be absolved from any damage or liability by reason of the termination and by reason of not fulfilling or carrying out the terms of this contract, other than the payment to the party of the second part of five hundred dollars as liquidated damages. . . .

"REFUSAL. It is further understood and agreed that in the event the party of the first part shall be offered a fair price for its factory and shall be desirous of selling the same, that the party of the second part shall have the refusal to purchase said plant at the price offered by said purchaser or purchasers; provided that the said party of the second part shall within ten days after notice, accept or refuse to take said plant at the price so offered. . . .

"CREAM. It is understood and agreed that the party of the first part will furnish and supply cream to the party of the second part of its own manufacture to fill orders taken at the prices fixed and provided by the party of the first part in the territories mentioned, except if the party of the first part shall be prevented from so doing by causes not under its control. . . ."

It appears from the court's findings that, on February 21, 1907, appellant found a purchaser for its plant, and on the 24th day of February, 1907, the respondent released its ten-day option to purchase under the contract, in order to enable the appellant to immediately make a sale of its plant, for which release appellant agreed to pay to respondent ninety per cent of the commission to become due on all goods sold by respondent for appellant under the contract, and which had then or should thereafter be delivered to the purchasers, treating all such sales and accounts as good and collectible for the purpose of settlement of the ninety per cent of such commission. There remains due and unpaid from appellant to respondent \$180.10 upon such commission.

The appellant consummated the sale of its plant March 5, 1907, and notified respondent of the sale. Prior to this time, respondent had taken orders for a large amount of the product of the appellant in pursuance of the terms of the contract, which appellant refused, after the sale of its plant,

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to deliver. The total amount of such unfilled orders was such that respondent's commission thereon under the contract would have been \$3,052.59 had appellant filled such orders and made collections thereon from the purchasers. At the time of the termination of the contract by reason of the sale of the plant, there was due from respondent to appellant the sum of \$2,411.25, on account of collections made and other small items, which was claimed by appellant in its affirmative answer as a counterclaim, and for which it prayed judgment against the respondent. The court concluded that there was due from appellant to respondent the items of \$180.10, \$3,052.59, and \$500 liquidated damages, making in all \$3,732.69, from which it deducted appellant's counterclaims, amounting to \$2,411.25, and rendered judgment against appellant for the balance of \$1,321.44.

Appellant contends that the learned trial court erroneously allowed the item of \$3,052.59 in respondent's favor, and that appellant was entitled to judgment against respondent for the sum of \$2,411.25, the amount of the counterclaim less the items of \$180.10, unpaid commissions, and \$500, liquidated damages.

By the express terms of the contract the commission which might become due to the appellant was to be "twenty cents per case for every case of cream actually sold, delivered and actually paid for;" and for the seeming purpose of emphasizing this provision, if indeed language could make it plainer, the contract further provided, in connection with payment of commission: "but no amount shall be paid upon any sales so made until the money shall be received by the party of the first part from the purchaser of said cream." Taking these provisions, especially in connection with the other services respondent was to render relative to the storing, billing, and collections, it becomes plain that respondent did not earn and is not entitled to the commission by the mere taking of orders, nor until the goods are actually delivered to and paid for by the purchasers. It necessarily follows, then, that re-

spondent cannot recover any such commission until after goods are delivered and paid for. So its right to recover in this action, except as to the item of \$180.10 unpaid commissions, becomes simply a question of damage by reason of appellant's failure to carry out the terms of the contract, in not filling orders and furnishing goods after the sale of its plant. The measure of this damage is the real subject of our inquiry. What respondent may have done in the way of procuring orders, and in rendering other services under the contract, looking to the sale of goods, no doubt would enter into the measure of damages had not the contract in express terms made provision for a fixed measure of such damage which might result to the respondent upon the happening of the very contingency which resulted in the termination of the contract by the appellant.

It is not contended by respondent that appellant failed to use its best endeavors to require the purchaser of the plant to assume the contract and fulfill its terms in place of appellant; so there is nothing in the way of giving its terms as to liquidated damages full force and effect, which, in the event of sale of the plant, is that, "*the party of the first part [appellant] shall be absolved from any damage or liability by reason of the termination and by reason of not fulfilling or carrying out the terms of this contract, other than the payment to the party of the first part of \$500 as liquidated damages.*"

The trial court held in effect that the \$500 liquidated damages did not cover loss of commission upon goods for which orders had been procured and not delivered at the time of the sale of the plant, and the termination of the contract, but covered only damages resulting from loss of commission upon sales which might be earned thereafter during the life of the contract, if continued in force. We are unable to agree with this contention. The language of the contract seems to us too plain for construction, and to be susceptible of no other meaning than that appellant was to be absolved

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from all damages, including loss of prospective commission on goods ordered and not delivered, as well as loss of commission on prospective future orders, other than the payment to respondent of \$500 as liquidated damages.

Our view, that by the terms of the contract the commission is not earned until goods are delivered and actually paid for, finds support in the case of *Merriman v. McCormick Harvesting Machine Co.*, 96 Wis. 600, 71 N. W. 1050. In that case the harvester company had broader powers as to the termination of its agency contract than the appellant here, but this appellant was as clearly within its rights in terminating this contract as the harvester company was in that case. So far as the rights of the agent to commission was concerned, the principle involved was the same. In that case the court held that the agent could not recover commission after termination of the contract, but was entitled to recover upon *quantum meruit* the reasonable value of the services in obtaining orders for machines which were afterwards actually delivered by the harvester company; but it is not claimed here that appellant filled any of the orders by dealing directly with the purchasers from whom respondent had obtained orders, and thus profited by respondent's service.

We are of the opinion that the learned trial court was in error in allowing respondent the item of \$3,052.59, on account of commission on orders for goods not delivered, and that appellant was entitled to have judgment upon its counterclaims amounting to \$2,411.25, after deducting therefrom the items of \$180.10, balance due upon commission, and the \$500 liquidated damages, which became due to respondent upon the termination of the contract.

The judgment of the superior court is reversed, with instructions to enter judgment in favor of appellant against respondent in accordance with this opinion.

RUDKIN, C. J., DUNBAR, MOUNT, and CROW, JJ., concur.

[No. 8002. Department Two. Decided July 17, 1909.]

JAMES A. RALTON, *Respondent*, v. SHERWOOD LOGGING
COMPANY, *Appellant*.¹

NEW TRIAL—MISCONDUCT OF JURY—VERDICT—IMPEACHMENT—AFFIDAVITS OF JURORS. On motion for a new trial the verdict of a jury cannot be impeached by affidavits of the jurors showing that they arrived at the verdict by consideration of a matter not in issue and withdrawn by the instructions given; especially in view of Bal. Code, § 5071, allowing impeachment of a verdict by affidavits of jurors only in case it was arrived at by resort to chance or lot.

TRIAL—NEW TRIAL—MISCONDUCT OF COUNSEL. It is not misconduct of counsel entitling a party to a new trial, that in argument to the jury counsel quoted the testimony of witnesses from the notes of the stenographer, no claim being made that they were incorrectly quoted.

Appeal from a judgment of the superior court for King county, Tallman, J., entered June 24, 1908, upon the verdict of a jury rendered in favor of the plaintiff for personal injuries sustained by an employee in a logging camp, after a trial on the merits. Affirmed.

Roberts, Battle, Hulbert & Tennant, for appellant.

James Hart and Jay C. Allen, for respondent.

PARKER, J.—This action was prosecuted in the superior court by the plaintiff against the defendant to recover damages on account of personal injuries which he alleges were the result of defendant's negligence while working in its logging camp. Upon a trial before the court and a jury, verdict and judgment were rendered in plaintiff's favor, from which the defendant appeals to this court. Briefly stated, and so far as necessary for our consideration, the facts here involved are as follows: The respondent was injured by the giving way and pulling down upon him of a tree by a cable attached thereto as a part of the tackle and appliances used

¹Reported in 103 Pac. 28.

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by appellant in its logging operations. We need not stop to describe the tackle, or the manner of applying the force or pull thereto, since the only question of negligence involved is as to whether or not appellant was negligent in fastening the cable to a tree of insufficient size and strength to stand the force which would necessarily be applied to it. This question was submitted to the jury by the court in the following concise instruction:

"I instruct you that the only question of negligence alleged in this case is negligence of fastening a block and cable to a hemlock tree of insufficient size and strength, and that the only allegation of negligence which you are called upon to consider is the allegation that the tree to which the line and block was fastened was a tree of insufficient size and strength to withstand the pull that was placed upon it."

Neither party complains of this instruction. We therefore quote it to show the exact issue submitted to the jury.

It is first contended by learned counsel for appellant that the evidence upon the question of its negligence in attaching the cable to a tree of insufficient size and strength was not such as to warrant the jury's finding, and that the court erred in denying the motion for new trial upon that ground. We have carefully read the evidence of the various witnesses touching this question and conclude that it was amply sufficient to support the verdict. We do not feel called upon to discuss the evidence in detail.

Upon the hearing of the motion for a new trial, appellant's attorney sought to show, by affidavits of five of the jurors, misconduct on the part of the jury in arriving at their verdict, in that they ignored the court's instruction above quoted. These affidavits are all in substance the same. We quote from one as printed in appellant's brief, as follows:

"That in consideration of the case by the jury, this affiant and the other jurors did not take into consideration the question of the size of the tree to which the lead block was fastened, but based its verdict upon the fact that it considered that the employees and servants of the defendant were

negligent in not giving to plaintiff a sufficient warning of his danger."

It is strenuously argued that the facts shown by these affidavits are such as to entitle appellant to a new trial upon ground of misconduct of the jury. The real question in this connection is as to whether or not such conduct can be shown by the affidavits of the jurors. Touching the use of affidavits of jurors to impeach their verdict, the general rule is stated in 2 Thompson on Trials, as follows:

"Section 2618. Upon grounds of public policy, courts have almost universally agreed upon the rule that no affidavit, deposition, or other sworn statement of a juror will be received to impeach the verdict, to explain it, to show on what grounds it was rendered, or to show a mistake in it; or that they misunderstand the charge of the court; or that they otherwise mistook the law, or the result of their finding; or that they agreed on their verdict by average, or by lot."

See, also, 29 Cyc. 982; 14 Ency. Plead. & Prac. 905. This court has heretofore announced its adherence to this doctrine. *Marvin v. Yates*, 26 Wash. 50, 66 Pac. 131; *State v. Parker*, 25 Wash. 405, 65 Pac. 776.

Counsel for appellant rely upon the latter case for the purpose of showing that the conduct of the jury as here shown does not inhere in the verdict, and, therefore, such conduct may be proven by the affidavit of jurors. But in that case the conduct of the juror upon which the court awarded a new trial consisted of very damaging statements against the accused made to the jury, while deliberating, entirely outside of the evidence, touching his knowledge of the accused's being connected with other crimes than the one involved in the trial, and because of that knowledge he knew the accused was guilty, when he had stated, upon his *voir dire* examination, facts indicating he had no knowledge of the accused and was free from prejudice against him. Upon that ground alone this court granted the defendant a new trial,

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but was careful to announce its adherence to the general rule by saying, at page 415:

"In considering the affidavits filed, we entirely discard those portions which may tend to impeach the verdict of the jurors, and consider only those facts stated in relation to misconduct of the juror, and which in no way inhere in the verdict itself."

Upon the subject of misconduct of the jury as a ground for new trial it is provided in subd. 2, § 5071 of Bal. Code (P. C. § 707), as follows:

"(2) Misconduct of prevailing party or jury; and whenever any one or more of the jurors shall have been induced to assent to any general or special verdict to a finding on any question or questions submitted to the jury by the court, other and different from his own conclusions, and arrived at by a resort to the determination of chance or lot, such misconduct may be proved by the affidavits of one or more of the jurors."

This is the only exception provided by statute for the consideration of affidavits of jurors touching their misconduct while considering their verdict. It is in substance the same provision which exists in California and South Dakota where the courts of those states have treated it as excluding affidavits of jurors showing their misconduct unless the misconduct is such as the statute says may be so shown. In the case of *Polhemus v. Heiman*, 50 Cal. 438, the court said:

"In this state the affidavits of jurymen cannot be received to impeach or defeat their verdict . . . The only exceptions to this rule are those in which the legislature has by express enactment authorized such attack upon the verdict by those who rendered it;"

which is quoted with approval in *Murphy v. Murphy*, 1 S. D. 316, 9 L. R. A. 820. It seems to us that the facts relied upon as misconduct on the part of the jury, and which are here attempted to be proven by their affidavits, inhere in the verdict. And for reasons of public policy which have been so often pointed out by the courts and text writers such

affidavits cannot be considered even if such facts be regarded as material to the question involved.

It is contended that the misconduct of counsel for the respondent in his argument to the jury is such as to entitle appellant to a new trial. There is some controversy as to exactly what this alleged misconduct consisted of, arising by reason of the condition of the statement of facts, over which there seems to have been considerable controversy in its settlement by the court. This conduct, however, amounted to nothing more unfavorable to the appellant than the quoting of testimony of witnesses from the notes of the stenographer who had taken the proceedings during the trial. It is not contended that the evidence was incorrectly quoted, and therefore we think the court did not abuse its discretion in allowing the argument to proceed in that manner. Indeed, it is difficult to understand how an argument could be made upon evidence placed before a jury without reference to it, and it certainly could be no worse to quote from it literally than to refer to it in some other more general manner, nor do we see that it can make any difference that the quotation was made from the notes of the stenographer instead of from memory or notes made by the attorney himself. This point has been squarely decided by this court. *State v. Costello*, 29 Wash. 366, 69 Pac. 1099; *State v. Churchill*, 52 Wash. 210, 100 Pac. 309. This renders it unnecessary for us to consider the errors assigned upon the manner of settling the statement of facts, since if the statement contained all the facts upon the manner of counsel's argument to the jury contended for by appellant, our conclusion would be the same.

We find no error and are of the opinion that the judgment of the lower court should be affirmed. It is so ordered.

RUDKIN, C. J., DUNBAR, MOUNT, and CROW, JJ., concur.

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Citations of Counsel.

[No. 7902. Department Two. July 19, 1909.]

A. L. SPENCER, *Respondent*, v. THE TOWN OF ARLINGTON
et al., *Appellants*.¹

MOTIONS—NOTICES—SERVICE. Under Bal. Code, § 4889, providing for the service of notices upon attorneys by leaving a copy at his office during his absence with his clerk or person having charge, or in a conspicuous place in the office, if no one is in charge, a service is good when made by dropping a copy through the transom on the floor of the office in front of the front door, which was locked, no one being in the office; especially where, upon calling at the office next morning, the copy is found in the possession of the clerk.

TRIAL—INSTRUCTIONS—REQUESTS. It is not error to refuse requested instructions when the same are given in substance in the general charge.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered June 23, 1908, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a pedestrian through stepping into an unguarded hole in a street. Affirmed.

L. N. Jones and Bell & Austin (Cooley & Horan, of counsel), for appellants, contended, *inter alia*, that the statute does not authorize a service by leaving a copy in a conspicuous place in the office unless the office is open at the time. *Haight v. Moore*, 36 N. Y. Super. Ct. 294; *Clafin v. DuBois*, 13 N. Y. Civ. Proc. 234; *Corning v. Pray*, 2 Wend. (N. Y.) 626; *Anon.*, 18 Wend. (N. Y.) 578; *Timolat v. Held Co.*, 15 Misc. (N. Y.) 630; *Livingston v. New York Elevated R. Co.*, 19 N. Y. Civ. Proc. 258; *Campbell v. Spencer*, 1 How. Prac. (N. Y.) 199; *Vail v. Lane*, 4 Hun 653; 19 Am. & Eng. Ency. Law (2d ed.), 648; *Fairfield v. Binnian*, 13 Wash. 1, 42 Pac. 632; *Times Printing Co. v. Seattle*, 25 Wash. 149, 64 Pac. 940.

Hulbert & Husted, for respondent.

¹Reported in 103 Pac. 30.

PARKER, J.—This is an appeal from a judgment rendered by the superior court upon a verdict favorable to the plaintiff on account of damages for personal injuries. The case has been in this court upon a former appeal, when it was remanded for a new trial. The decision upon that appeal is reported in 49 Wash. 121, 94 Pac. 904, where the issues are described at some length, so they need not be repeated here.

During the progress of the trial, the court permitted counsel for plaintiff and respondent, over the objection of counsel for defendants and appellants, to read from the testimony of certain witnesses taken upon the former trial and embodied in the statement of facts certified by the court following that trial. This was allowed by the court under the provision of chapter 26, p. 50, Laws 1905, which provides:

“Section 1. The testimony of any witness, deceased, or out of the state, or for any other sufficient cause unable to appear and testify, given in a former action or proceeding, or in a former trial of the same cause or proceeding when reported by a stenographer, or reduced to writing, and certified by the trial judge, upon three days’ notice to the opposite party or parties, together with service of a copy of the testimony proposed to be used may be given in evidence in the trial of any civil action or proceeding, where it is between the same parties and relates to the same matter.”

The only objection urged against the reading of this testimony was based upon the manner of service of the notice provided for in the law above quoted, which appellants contend was not such as to entitle the respondent to have the testimony read upon the trial. Counsel for both sides proceed in their argument upon the theory that the sufficiency of the service of the notice, the manner of which is not provided for in this law, must be determined by the general provision for service of notices incident to proceedings in pending actions, being § 4889 of Bal. Code (P. C. § 349), which reads:

“The services may be personal or by delivery to the party or attorney on whom service is required to be made, or it

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may be as follows: (1) If upon an attorney, it may be made during his absence from his office by leaving the papers with his clerk therein, or with a person having charge thereof; or, when there is no person in the office, by leaving it between the hours of six in the morning and nine in the evening in a conspicuous place in the office; or, if it is not open to admit of such service, then by leaving it at the attorney's residence with some person of suitable age and discretion."

The testimony was read during the trial on June 19th, and the facts which respondent claims constituted the service of the notice are conceded to be as follows: On June 15th between the hours of six and half-past seven o'clock in the evening, while there was no one at the office of appellants' attorneys, and while their office was locked, the notice was dropped through the transom of the office door and allowed to fall down upon the floor immediately in front of the door on the inside. On the following day Mr. Husted, one of respondent's attorneys, appeared at the office of appellants' attorneys, where he found a Mr. Wells in charge of the office, and who had the notice on his desk before him. No objection is made to the form and sufficiency of the notice, the objection only going to the manner of service.

Subd. 1, § 4889 of Bal. Code, above quoted, is the same as subd. 1, § 1011 of California Code of Civil Procedure, except as to hours of service and a provision for service by mail. The supreme court of that state, passing upon a similar state of facts as constituting good service under that section, said in the case of *January v. Superior Court*, 73 Cal. 537, 15 Pac. 108:

"The service of the notice, which was made by depositing a copy thereof through the door into the postal-box which had been placed there for the reception of documents, was sufficient. It cannot be said that a box so clearly designated by an attorney as the proper place for the deposit of letters and papers during his absence from the office is not a 'conspicuous place' within the meaning of section 1011 of the Code of Civil Procedure."

It seems to us that on the floor and immediately in front of the door on the inside is a very conspicuous place. Indeed, it is not easy to conceive of a place in the ordinary law office more conspicuous, or a place where a paper would more likely attract attention. We have even more here than appears in the California case, for here the notice did actually come into the hands of the person having charge of the office, not later than the following day which was three days before the reading of testimony at the trial.

The case of *Times Printing Co. v. Seattle*, 25 Wash. 149, 64 Pac. 940, cited by appellants, we think is clearly distinguishable from the facts of this case. In that case it was held that service could not be made upon a clerk in the law office when the attorney to be served was himself present. The condition prescribed by § 4889 permitting other than personal service upon the attorney did not exist. The attorney being present when the service was being made, there was no excuse for not serving him personally. The case of *Fairfield v. Binnian*, 13 Wash. 1, 42 Pac. 632, cited by appellants, we think also is distinguishable from the situation we have here. That was the service of a notice of appeal, and the affidavit of service failed to show the manner of service, simply stating it was left at the attorney's office, it being silent as to whom the notice was delivered to or left with, and silent even as to the notice being left in a conspicuous place; and besides, the proof failing to state any of the conditions which, under § 4889, would permit the service other than personally on the attorney, of course it was insufficient.

Some of the New York cases cited by appellants' counsel lend some support to their contention that the door of the office being locked rendered the office "not open to admit of such service" as was made in this case. But it seems to us that the office was sufficiently open to admit of service by leaving the notice in a conspicuous place therein if that could be easily accomplished by the use of any opening into the office. Touching matters of practice of this nature which

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are not jurisdictional, we are impressed with the soundness of the views of the supreme court of California expressed in the case of *Smith v. Whittier*, 95 Cal. 279, 30 Pac. 529, where, on page 295, it is stated:

"Rules of procedure, whether statutory or made by the court, are intended to facilitate courts in doing justice between the parties. They are framed with a view to enable litigants to properly present their cause for determination; and courts, in the exercise of their supervisory care over them should be inclined to take that course which will enable them to ascertain the actual facts in a cause. For the guidance of parties, certain formalities are required, and certain times specified within which the several steps are to be taken; but, except in matters which are jurisdictional, these provisions are intended for the convenience of courts and litigants, and should be liberally construed."

We are of the opinion that the service was sufficient, especially since it actually came into the possession of a person in charge of the office, and it was therefore not error to permit the testimony to be read to the jury.

It is contended that the court erroneously refused to give certain requested instructions in behalf of appellants upon the alleged contributory negligence of respondent, which was an issue in the case. We have carefully read the instructions so requested, and also those given by the court upon the same subject, and conclude that the instructions given by the court covered the same matters, in substance, as requested by appellants' attorneys, in so far as it was necessary to give such requested instructions, and therefore no error was committed by the court by such refusal.

We are of the opinion that there is no reversible error shown in this record, and that the judgment of the superior court should be affirmed. It is so ordered.

RUDKIN, C. J., CROW, MOUNT, and DUNBAR, JJ., concur.

[No. 7704. Decided July 20, 1909.]

In the Matter of the Estate of FRANCIS M. GUYE, Deceased.
THE STATE OF WASHINGTON, *on the Relation of John W.*
Guye et al., Plaintiff, v. THE SUPERIOR COURT FOR
*KING COUNTY et al., Respondents.*¹

EXECUTORS AND ADMINISTRATORS—LETTERS OF ADMINISTRATION—PREREQUISITES—INTESTACY—JURISDICTION—COMMUNITY PROPERTY. The power to grant letters of administration being purely statutory, intestacy is a necessary prerequisite to the granting of general letters of administration in this state, under Bal. Code, §§ 6141, 6142, authorizing administration upon the estates of intestates and requiring the application to show that the deceased left no will; hence the superior court is without jurisdiction to grant letters of administration to the wife upon the community property, after appointing executors and admitting to probate the will of her deceased husband, devising and bequeathing his half interest in the community property and his separate estate, and naming his executors.

SAME—WILLS—HUSBAND AND WIFE—COMMUNITY PROPERTY—POWER TO NAME EXECUTOR. Under Bal. Code, §§ 4490 and 4621, making one-half of the community property subject to the testamentary disposition of each spouse, the testator has the power to name the executor to administer the estate, which necessarily carries with it the administration of all community property for such length of time as necessary to pay debts and speedily close the estate.

PROHIBITION—ADEQUACY OF REMEDY AT LAW—LETTERS OF ADMINISTRATION. Prohibition lies to prevent the threatened issuance of letters of general administration without jurisdiction, since there is no adequate remedy at law.

Application filed in the supreme court October 7, 1908, for a writ of prohibition to the superior court for King county, Morris, J., to prevent the issuance of letters of administration, after a hearing before the court on the merits on an application for letters. Writ granted.

Higgins, Hall & Halverstadt, for relators.

Blaine, Tucker & Hyland, for respondents.

¹Reported in 103 Pac. 25.

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Opinion Per RUDKIN, C. J.

RUDKIN, C. J.—On the 25th day of May, 1908, Francis M. Guye, died testate in King county of this state, leaving an estate therein subject to administration. On the 2d day of June, 1908, the last will and testament of the decedent was admitted to probate in the superior court of King county, a certificate of probate was granted, and the appointment of the relators as executors and trustees of the will was confirmed. The executors and trustees duly qualified and entered upon the discharge of their duties, an inventory of the estate was filed, appraisers appointed, and notice to creditors published as prescribed by law.

On the 8th day of June, 1908, after the admission of the will to probate and the confirmation of the appointment of the trustees and executors therein named, Eliza W. P. Guye, surviving wife of the deceased, presented her petition to the superior court of King county praying for the appointment of an administrator for the community property belonging to the estate of her deceased husband and herself. Notice of this application was duly given, and the matter came on regularly for hearing. At the close of the hearing, the court indicated its intention to grant the prayer of the petition, whereupon the executors and trustees named in the will applied to this court for a writ of prohibition to restrain the superior court from carrying out its expressed intention. The case is now before us for final determination on the return to the alternative writ, and two questions are presented for our consideration. First, was the superior court acting without or in excess of its jurisdiction; and second, if so, have the relators a plain, speedy, and adequate remedy in the ordinary course of law.

Section 6141, Bal. Code (P. C. § 2433), provides that,

“Administration of the estate of a person *dying intestate* shall be granted to some one or more of the persons hereinafter mentioned, and they shall be respectively entitled in the following order: . . .”

Section 6142 (P. C. § 2435), provides that,

"Application for letters of administration shall be made by petition in writing, signed by the applicant or his attorney, and filed in the superior court, which petition shall set forth the facts essential to giving the court jurisdiction of the case, and such applicant, at the time of making such application, shall make an affidavit, stating, to the best of his knowledge and belief, the names and places of residence of the heirs of the deceased, and that the deceased *died without a will*."

The power to grant letters of administration upon the estate of a deceased person is purely statutory, and it would seem that intestacy is a necessary prerequisite to the granting of general letters of administration in this state.

"The grant of original and general administration by a probate court corresponds to that of letters testamentary issued to an executor; its application being, however, in cases where a deceased person whose estate should be settled *either died wholly intestate or left a will of which, for some reason, no one can be a qualified executor within the jurisdiction*. According to the various cases which may arise, there are various special kinds of administration, besides what may be termed 'general administration.'" Schouler, Executors (3d ed.), § 90.

Our statute provides for general administration in cases of intestacy, for administration *de bonis non*, and for special administration pending contests over wills or the granting of letters of administration, and in other like cases, but we find no statutory authority for a general administration upon community property, such as is here sought.

"To the grant of general and original administration upon the estate of a deceased person, *intestacy is a prerequisite*; such allegation should be made in the petition, and the court should have reason to believe the statement true. Letters of general administration, granted during the pendency of a contest respecting the probate of a will, or after probate, regardless of the executor, are null and void. And local statutes interpose reasonable delay to such grants of administration, in order to give full opportunity for the production

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of a will, so that the estate may be generally committed, if possible, according to the last expressed wishes of the deceased." Schouler, Executors (3d ed.), § 91.

See, also, 1 Woerner, American Law of Administration, *p. 402; 18 Cyc. 82; *In re Davis' Estate*, 11 Mont. 196, 28 Pac. 645; *Slade v. Washburn*, 25 N. C. 557.

Section 6128, Bal. Code (P. C. § 2420), provides that if letters of administration have been granted, and a will is thereafter found and probated, the letters already granted shall be revoked and letters testamentary or with the will annexed granted in their stead. The letters of administration sought in this case are general in their character, so far as the community property is concerned at least, and the court below was about to grant them, regardless of the fact that a will had been probated and executors were already in charge of the estate.

In *In re Hill's Estate*, 6 Wash. 285, 33 Pac. 585, it was intimated, rather than decided, that the husband or wife could not appoint an executor to take charge of the community property to the exclusion of the surviving spouse, and that in such cases application for an administrator for the community estate might be made under Bal. Code, § 6141, *supra*. But, as said by Mr. Justice Stiles in his concurring opinion, many questions were argued and decided in the majority opinion in that case that were not involved in the case itself, and the majority of the court seems to have lost sight of the fact that a general grant of letters of administration is only authorized in case of intestacy.

By §§ 4490 and 4621, Bal. Code (P. C. §§ 3876, 2703), one-half of the community property is subject to the testamentary disposition of each spouse, subject to the community debts, and in the absence of some controlling statute, the power to name an executor to administer an estate is co-extensive with the power to devise or bequeath the estate itself. In the case at bar, the deceased devised and bequeathed his half interest in the community estate and named execu-

tors to administer that estate. Owing to the peculiar characteristics of the community estate, administration upon an undivided one-half interest therein is impracticable, if not impossible, so that administration upon the whole estate is indispensable upon the death of either spouse. The right to name the executor or administrator must vest in either the husband or wife; for, in the nature of things, there cannot be two personal representatives for the same estate acting independently of each other. It is said that it will work an unwonted hardship upon the survivor if one of the spouses may name an executor to take charge of the estate after death, to the exclusion of the survivor; but power to make the selection must be lodged some place, and it is suggested in the briefs that it would be equally unfair to vest the sole power of selection in the survivor. But these questions of policy are for the legislature and not for the courts, and suffice it to say, we are convinced that the husband or wife, as the case may be, has authority under our statutes to name an executor for community as well as for separate property, and that the executor thus named cannot be superseded by an administrator appointed at the suggestion of the surviving spouse.

We do not desire as to be understood as holding that the husband or wife may tie up the community property longer or farther than is necessary to settle and close the estate. Administration upon the whole community estate upon the death of one of the spouses arises from the necessities of the case, and the surviving spouse has a right to insist that it shall be speedily closed and that his or her half of the community property shall not be withheld after the debts and expenses of administration have been paid. We are of opinion that the court below was acting in excess of its jurisdiction when it attempted to appoint an administrator for the community property under the circumstances disclosed by this record; and if so, the relators have no adequate remedy at law under former holdings of this court. *In re*

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Citations of Counsel.

Sullivan Estate, 36 Wash. 217, 78 Pac. 945; *State ex rel. Speckart v. Superior Court*, 48 Wash. 141, 92 Pac. 942.

The writ will therefore issue as prayed.

CHADWICK, FULLERTON, MOUNT, DUNBAR, and CROW, JJ.,
concur.

[No. 7608. Decided July 20, 1909.]

C. W. ARIS, *Respondent*, v. MUTUAL LIFE INSURANCE
COMPANY OF NEW YORK, *Appellant*.¹

APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS. Error in giving or refusing instructions is harmless where, under the evidence, no other verdict could have been rightfully given or allowed to stand and the prevailing party was entitled to judgment notwithstanding a contrary verdict, and the verdict rendered follows as a conclusion of law from the evidence.

INSURANCE—POLICY—APPLICATION—FALSE ANSWERS—OCCASIONAL USE OF LIQUORS. Answers in an application for life insurance that the insured had no daily habit of drinking, that he drank occasionally, that he drank whiskey, and had always been in the habit of taking an occasional drink, are not shown to have been wilfully and intentionally false, so as to avoid liability on the policy, by evidence that at intervals he drank to excess and became intoxicated; there having been no representations made as to that point, although the medical examiner was instructed to make special investigation as to the occasional use of intoxicants.

Appeal from a judgment of the superior court for Spokane county, Poindexter, J., entered March 21, 1907, upon the verdict of a jury rendered in favor of the plaintiff, in an action upon a policy of life insurance, after a trial on the merits. Affirmed.

Hughes, McMicken, Dovell & Ramsey, for appellant, contended, *inter alia*, that the representations as to drinking intoxicants were very material. *Provident Sav. Life Assur. Co. v. Dees*, 120 Ky. 285, 86 S. W. 522; *Mutual Life Ins. Co. v. Mullan*, 107 Md. 457, 69 Atl. 385; *Mutual Life Ins.*

¹Reported in 103 Pac. 50.

Co. v. Thomson, 94 Ky. 253, 22 S. W. 87; *Brignac v. Pacific Mut. Life Ins. Co.*, 112 La. 574, 36 South. 595, 66 L. R. A. 322. The representations were warranties and rendered the policy void. *Dimick v. Metropolitan Life Ins. Co.*, 69 N. J. L. 384, 55 Atl. 291, 62 L. R. A. 774; *Owen v. Metropolitan Life Ins. Co.*, 74 N. J. L. 770, 67 Atl. 25, 122 Am. St. 413; *Davey v. Aetna Life Ins. Co.*, 20 Fed. 482; *Brignac v. Pacific Mut. Life Ins. Co.*, *supra*; *Connecticut Mut. Life Ins. Co. v. Young*, 77 Ill. App. 440; *Fidelity Mut. Life Ins. Co. v. Beck*, 84 Ark. 57, 104 S. W. 533, 1102; *Prudential Ins. Co. v. Hummer*, 36 Colo. 208, 84 Pac. 61; *Metropolitan Ins. Co. v. Rutherford*, 98 Va. 195, 35 S. E. 361; *American Credit Indemnity Co. v. Carrollton Furniture Mfg. Co.*, 95 Fed. 111; *Union Cent. Life Ins. Co. v. Lee*, 20 Ky. Law 839, 47 S. W. 614.

Kenyon & Setters, for respondent, contended, among other things, that the answers were full and complete so far as they went, and the appellant should have exacted a fuller or more precise answer, if desired. *Billings v. Metropolitan Life Ins. Co.*, 70 Vt. 477, 41 Atl. 516; *Liberty Hall Ass'n v. Housatonic Mut. Fire Ins. Co.*, 7 Gray 261; *Fitch v. American Popular Life Ins. Co.*, 59 N. Y. 557, 17 Am. St. 372; *Phoenix Life Ins. Co. v. Raddin*, 120 U. S. 183, 7 Sup. Ct. 500, 30 L. Ed. 644; *Edington v. Mutual Life Ins. Co.*, 67 N. Y. 185; *Loud v. Citizens' Mut. Ins. Co.*, 2 Gray 221; *Campbell v. New England Mut. Life Ins. Co.*, 98 Mass. 381.

CROW, J.—Action by C. W. Aris against the Mutual Life Insurance Company of New York, a corporation, to recover \$500 on an insurance policy issued on the life of one William B. Aris. From a judgment in favor of the plaintiff, the defendant has appealed.

The appellant contends that the trial court erred, (1) in an instruction given, and (2) in refusing an instruction requested. It is not necessary to state these instructions. Conceding, without deciding, that the one given was erroneous,

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and that the one requested was proper, the errors predicated thereon were harmless, for the reason that, under the evidence, no verdict could have been rightfully rendered other than one for the respondent, and that had a verdict been returned in appellant's favor, it would have been the duty of the trial court to enter judgment in favor of the respondent, notwithstanding such verdict, had he moved therefor.

The pleadings and undisputed evidence show that, on May 26, 1906, William B. Aris, the assured, made written application to the appellant upon one of its printed blank forms, for five life insurance policies, one payable to his son C. W. Aris, the respondent herein, and the others payable to other members of his family; that the application contained the following questions and answers thereto, made by the applicant to appellant's duly authorized medical examiner:

"(8) What is your daily or other habit in the use of wines, spirits or malt liquors? No daily habit, an occasional drink. (a) Which of these do you use? Whiskey. (b) What has been your habit in the past? Have always been in the habit of taking an occasional drink; sometimes several weeks pass without any. (d) Do you now use, or have you ever used, opiates, chloral, cocaine, or any other narcotic drug? If so, to what extent? No;"

that the policies were thereafter issued; that William B. Aris died on April 2, 1907; that proof of his death was made; that appellant denied its liability; that separate suits were commenced by the beneficiaries; and that trial was had in this cause, with the stipulation that the other actions should abide its result. The appellant, after pleading the substance of the answers above mentioned, which were warranted to be true and were a consideration for the policy, further alleged:

"(3) That in truth and in fact the said William B. Aris was, as he well knew, at the time of the signing of said application, for a long time prior thereto and ever afterwards until his death, addicted to the habit of drinking intoxicating liquors daily in large quantities and so as to injure his health thereby, and the said William B. Aris did, at the time of

signing of said application, and did continue at all times until his death, to make use of chloral and other narcotic drugs so as to injure his health.

"(4) That said defendant company did not know, and had no means of knowing until after the death of the said William B. Aris, of the habit of the said William B. Aris, as aforesaid, of habitually drinking, or of the use by the said William B. Aris of chloral or other narcotic drugs, or either of them."

These allegations were denied by the respondent. On the trial no evidence was offered to show that the assured had been addicted to the use of chloral or other narcotic drugs, or that he had injured his health by the use of such drugs or intoxicating liquors. The only issue tried was whether the answers of the assured made in the application, relative to his use of intoxicating liquors, were false; or in other words, were they such misrepresentations of the actual facts as to amount to a breach of his warranty, and avoid the policy. A number of witnesses testified as to the habits of the assured in the matter of using intoxicating liquors. One Hall, called by appellant, stated that he had known the assured for about two years immediately preceding the date of the application, and during that time had on several occasions seen him intoxicated. He in part testified on his examination in chief as follows:

"Q. How many years was he in Edwall altogether? A. Two; two years . . . Q. And it was during that time you saw him intoxicated? A. Yes, sir. Q. Well, how often? A. Oh, I could not say how often. Sometimes he apparently would be, for two or three days at a time, and then there would be times when apparently he would not be. Q. He would be what, for two or three days at a time? A. Under the influence of liquor. Q. For two or three days at a time? A. Yes, sir . . . Q. Now, how frequently would those sprees occur? A. I do not know that I could tell you exactly. I just would barely see him on the street in that condition. Sometimes it seemed as though they were quite frequent, and then there would be times it seemed he would be keeping very straight. Q. Of course, you cannot remember

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the exact times that these lasted or occurred? A. No, sir. Q. But can you tell the jury a little more exactly about how often he would have these sprees? Just approximate it as near as you can, Mr. Hall. A. Oh, I suppose that he would probably—every three or four weeks. Q. Every three or four weeks approximately? A. Approximately. Q. Well, how would he demonstrate his condition of intoxication, Mr. Hall? A. Well, I don't know of any particular difference from any other man; quite talkative. Q. Did he stagger? A. No; I don't know as I ever saw him stagger. Q. He was not affected that way ordinarily? A. No. Q. But you knew he was intoxicated? A. Yes, sir."

No stronger evidence than this was produced in favor of appellant as tending to show frequent intoxication. On cross-examination the same witness further testified:

"Q. Now, did you ever see him when he gave any other physical manifestation of intoxication, other than by his talk? A. No, I never did. Q. So that, outside of the fact that he was talkative at times, you would not have noticed that he was intoxicated? A. No, I do not think I would. Q. Did you ever see Mr. Aris when he was incapacitated from doing business by the use of intoxicating liquor? A. No, sir. Q. Now, you stated that you were unable to fix the times; that is, intervals, between the times when he drank, definitely. I want to ask you if it is not a fact that on one occasion at least, that between three and four months intervened between his use of intoxicating liquor at all while at Edwall, approximately four months? A. I think I stated I was not able to fix the time. Q. That is what I say. I wanted to ask of you if it is not a fact, while he was living at Edwall, and during the last year he was at Edwall, there was four months approximately intervened at one time during which he used no liquor whatever? A. Yes, there might have been. I do not know that he did not use any. I could not say as to that."

One Butler, another witness for appellant, stated that he knew the assured drank some, and had seen him drunk once. Another witness, Balmer, stated that at times the assured would get "too much." Another, that on several occasions the assured was under the influence of liquor, and that the

witness should have hated to have done business with him. One witness for respondent saw the assured drunk once, but stated that he was well acquainted with him for three years prior to his death, meeting him frequently, doing business with him, and that he had once noticed him under the influence of liquor, evidently referring to the occasion on which he had seen him drunk. No witness stated that he had actually seen the assured drunk on more than one occasion. Some witnesses said he was occasionally full; others that he was several times under the influence of liquor; others that he was sometimes intoxicated and talkative. All who were asked the question, except one witness who testified to a single instance to the contrary, stated that he was always able to attend to the transaction of his business and did so. Members of his family and other witnesses, in substance, stated that he drank occasionally, but that at times he would go for weeks and sometimes months without doing so.

The controlling issue to be determined was whether the insured wilfully and intentionally made false answers in his application. Testing the truthfulness of his statements by the facts proven, we hold he did not, and that the appellant has failed to sustain its defense. The assured said that he had no *daily* habit of drinking. The evidence sustains the truthfulness of this statement, as days and even weeks or months passed without his drinking. As to his *other* habits, he stated that he drank occasionally; that he drank whiskey, and that he had *always* been in the habit of taking an occasional drink. The first definition of "occasional" given by the Standard Dictionary is: "Occurring more or less frequently, but not at fixed or regular intervals." A more apt term could not have been used to describe the assured's habit of drinking. He drank more or less frequently; sometimes more frequently, again less frequently for weeks at a time, or not at all. His intervals of drinking were not fixed or regular. He was not asked whether he at any time took too much; whether he became full, talkative, intoxicated, or

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drunk, and made no representations in that regard. The facts proven are not inconsistent with the truthfulness of his answers. The appellant was advised that he drank on occasions; that he had always done so, and, having such information, accepted the risk and issued the policy. A printed pamphlet of appellant's instructions to its medical examiners was admitted in evidence. It contained the following clause:

"The regular or *occasional* use of intoxicating liquors, tobacco or narcotics needs special investigation, as experience has proved that habits of drinking and the use of narcotic agents have more influence in determining longevity than any other factor in the problem of life insurance. Therefore explicit statements regarding habits of drinking must be given, avoiding the use of such terms as 'moderate,' 'occasional,' etc."

Notwithstanding the fact that the assured, in stating his habits, used the word "occasional" in his answers to appellant's medical examiner, the appellant issued the policy, and it is in no position to now deny its liability thereon. Without regard to instructions given or refused, the only verdict which the jury could have properly rendered was the one it did render, and the errors of which appellant complains were not prejudicial. In *Denny v. Kleeb*, 40 Wash. 634, 82 Pac. 920, this court said:

"A judgment will not be reversed because of error in giving or refusing instructions, when the verdict rendered is manifestly right and in accordance with the evidence. In other words, errors growing out of a charge are always to be disregarded when the verdict is so plainly in accordance with the evidence that it follows as a conclusion of law thereon. *Davis v. Gilliam*, 14 Wash. 206, 44 Pac. 119; *Secor v. Oregon Improvement Co.*, 15 Wash. 35, 45 Pac. 654."

We hold that the verdict in this case follows as a conclusion of law from the evidence. The judgment is affirmed.

RUDKIN, C. J., DUNBAR, FULLERTON, and CHADWICK, JJ.,
concur.

MOUNT, GOSE, PARKER, and MORRIS, JJ., took no part.

[No. 8008. Department Two. July 21, 1909.]

MATTIE W. SMITH, *Appellant*, v. THE CITY OF SPOKANE,
Respondent.¹

MUNICIPAL CORPORATIONS—ACTIONS—PRESENTING CLAIM—DAMAGES FROM GRADING STREET. The charter of Spokane requiring all claims for damages for personal injuries or for injuries to property, sustained by reason of the negligence of the city, to be filed with the city clerk within one month, applies to claims for damages to lots by reason of the negligent removal of lateral support in grading a street.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered November 28, 1908, dismissing an action against a city for damages by reason of the negligent removal of lateral support, upon sustaining a demurrer to the complaint. Affirmed.

John Salisbury, for appellant.

L. R. Hamblen, F. D. Allen, and Harry A. Rhodes, for respondent.

PER CURIAM.—This action was brought by plaintiff and appellant, against defendant and respondent, to recover for damages to her property caused by the removal of the lateral support to her lot, by the grading of the street, by the city of Spokane, on which appellant's property abutted. A demurrer to the complaint was sustained. The plaintiff electing to stand on her complaint, the cause was dismissed, and appeal followed.

The demurrer was to the effect that the complaint did not state a cause of action, for the reason that it did not appear notice had been given to the city of Spokane under the provisions of the charter, which provides, in substance, that all claims for damages for personal injuries or for injuries to

¹Reported in 102 Pac. 1036.

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property, alleged to have been sustained by reason of the negligence of the city or any officer, agent, servant, or employee thereof, must be presented to the city council within one month after any such injuries shall have been received, and that the refusal and omission to present such claim shall be taken to be a waiver of all damages on account of such injuries.

It is conceded that no claim was filed; so that the only question for our investigation is, In an action for damages for the removal of the lateral support caused by the grading of a street, must the claim for such alleged damages, under the provisions of the charter of the city of Spokane, be filed with the city council? It is not necessary to enter into a discussion of the merits of this question, for the same question was presented to this court in *Postel v. Seattle*, 41 Wash. 432, 83 Pac. 1025, under a charter provision of the city of Seattle which was practically the same as the charter provision involved in this case. It was there decided that such charter provision applied to claims for damages to lots by reason of a change of grade. Under the authority of that case, the judgment in this case must be affirmed.

[No. 7839. Department Two. July 22, 1909.]

AMIDOS DESJARDINS, *Respondent*, v. ST. PAUL & TACOMA
LUMBER COMPANY, *Appellant*.¹

MASTER AND SERVANT—FELLOW SERVANTS—SUPERIOR—DETAIL OF WORK. Where a millwright, acting as foreman, and assisting in the erection of a post, which he was holding in place with his hands, negligently let go, whereupon it fell and injured his helper, he is, as to such act, a fellow servant, where it appears that a mere boy could have held the post; since that was a mere detail of the work for which the master was not responsible.

SAME—NEGLIGENCE—PROXIMATE CAUSE. Where a millwright who was holding a post in position negligently let go and it fell, causing injury to a fellow servant, his negligence was the proximate cause of the injury, and it is immaterial that the post would not have fallen if a sling had been attached nearer the top of the post.

Appeal from a judgment of the superior court for Pierce county, Irwin, J., entered October 17, 1908, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee in a sawmill. Reversed.

Blattner & Chester and L. B. da Ponte, for appellant.

Johnston & Swindells, for respondent.

MOUNT, J.—Action for personal injuries. Plaintiff recovered a judgment in the court below. The defendant has appealed.

It is urged by the appellant that the evidence is insufficient to sustain the judgment. It appears that the respondent was injured while working in the appellant's sawmill, on March 7, 1908. Respondent was a millwright. He had been employed about the mill of the appellant for some time. One S. B. Wilson was the head millwright, and it was his duty to keep the mill in repair and in running order, and to direct new work. Under Mr. Wilson were several millwrights, among whom were Joe Brandt and the respondent and some helpers.

¹Reported in 102 Pac. 1034.

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On the morning of March 7, 1908, Mr. Wilson directed Mr. Brandt to take respondent and two helpers and set up a post in the mill. This post was between eight and nine feet long and twelve by fourteen inches square. The post was prepared by Mr. Brandt and respondent. A tenon was framed on one end of the post. This tenon was to be placed in a mortise in a sill above. The bottom of the post was to rest on a sill below. After the post was framed as above stated, respondent and Brandt carried it to the place where it was to be set up. They raised it into a vertical position, but they were not able to insert the tenon into the mortise above. While they were endeavoring to do so, the post fell. It was then suggested by Mr. Brandt that they put a block and tackle on the post. The post was again raised on end. A sling was placed around the post near the bottom. The block and tackle were then fastened into the sling and to the sill above. Respondent and Brandt and the helpers then attempted to pull the post into position with the block and tackle. The tenon entered the mortise about one-eighth of an inch, but the men could not pull it into place. Brandt then suggested that they get a jack and place it under the lower end of the post and force it into position by means of the jack. One of the helpers went for the jack. Respondent got down below the post to scrape away the sawdust and place a block for the jack to rest upon. Brandt attempted to hold the post with his hands. While holding the post, Brandt took hold of the rope of the block and tackle and removed his hands from the post, which thereupon toppled over and fell. Respondent attempted to get out of the way of the post, but it struck him and injured him about the back. The respondent described how he was injured as follows:

"On the 7th of March I got to the mill about twenty minutes to seven. I changed clothing, took my tools and went to the place where I was working the day before, on the next panel to this one. I stayed there until Mr. Brandt came, which was four or five minutes. I said, 'What have you got today?' He said, 'I don't know; we will wait for Mr. Wilson.'

He was the head millwright for both mills. We waited there for a while and finally Mr. Wilson came. Brandt and I stayed over here about twenty-five feet, and Brandt met Mr. Wilson by the post that was to be put up. Mr. Wilson showed Mr. Brandt this and said he wanted the post put up, as he showed him the mortise. The mill was running and I could not hear what was said, but I saw him show the mortise. Mr. Wilson went away and Brandt called me over to him. I went over to him and he said, 'We want to put up a post here.' I said, 'All right.' I said, 'I will go and get an adz and other tools.' I went over for them and I had to grind them, and Mr. Brandt marked the place with a pencil, and he said, 'Put that down about two and a half inches for the post to set in.' I measured with my rule from the outside edge and said, 'It is only ten inches and the post is twelve.' He said that another timber goes alongside of it to give the post a bearing. So I said, 'All right.' He said that Bunker will bring that timber. Mr. Bunker is supposed to represent Wilson when Wilson was not around, or when he was at the other mill. I started at that and Bunker came around and I helped him, and he went back and got this post. He had left it over on the truck. Brandt said, 'Let us put the post on the trestle.' We did that and Brandt went for the tool chest at the millwright room and got a slick and jack. That was about nine or ten o'clock in the morning, and I went to work and framed that sill and dapped that, and also this piece here (indicating) to receive the post. That was two inches, to give the post a bearing. I then waited awhile for Brandt, and in the meantime I ground some tools which were dull and after I got through was standing by the post. Brandt came around about eleven o'clock. He measured up the length of the post and scratched the post. I helped him saw the post. Then he said, 'I will frame the tenon.' I went away for a minute and when I came back there was a ladder up here (indicating) and I took my wrench and hammer and went up the ladder and loosened the board on the header. Brandt was just through framing the tenon and he said, 'Come down here.' I did so, and he and I carried the post over there. He said, 'Put your end down,' which I did, and he raised the post like that (indicating). 'Now,' he said, 'pinch it up,' and I did it with a pinch bar, like that (indicating). It was pretty tight. He looked at it and said, 'We

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cannot get it in that way,' and said to loose it up, and I did. Then I pinched it over and the post fell. He stood there and I was here (indicating). Then he said, 'Let us pick it up.' We picked up the post and stood it up like that (indicating) against the header. Brandt then stood here and said, 'Put the tackles on,' and I went up the ladder, and stood up here to put the tackles. Brandt said, 'Give me the hooks down,' which I did, on this side. He went to work and grabbed the header.

"Q. What is the header? A. This is the header here (indicating). Brandt looked it over and told Mr. Hagley to get the sling. I looked down and saw Hagley get the sling and Brandt started to put it down here. When I saw that I started down and he put it in. The post then stood like that on the out edge. Then he told Hagley to pull on the rope. Then Mr. Young came up. I saw the tongs here and so I drove them in to be sure. Mr. Brandt said, 'Pull on the tackle and work the post over a little.' Then he put the tenon in the mortise just like that (indicating). Brandt was here and I was to the left. Hagley and Young held the rope. The timber was like this here (indicating). Brandt said, 'The tenon is too tight,' and said 'Joe, you get the jack and we will push it up.'

"Q. What was under the post? A. Nothing there. Q. Was there anything solid under there? A. Only sawdust. This timber was back here. After I jumped down here, there was a block here, and another under the sill. I looked at this block and Brandt held the post, and I thought he was going to hold it. I did not suppose he would let it go. I could see the outside edge of the tenon in the mortise. Q. How far up in the mortise had the tenon gone? A. About an eighth of an inch. I could see the trimming of the tenon on that side, but the post stood slanting a little. When I jumped down, Mr. Young let go of the rope and went for a jack on the north panel of the mill. There was no floor here on this panel. I looked at the block to see which was the easiest. I stepped down to look at the block and then I just happened to look up and see Brandt had let go the post and had his hand here on the rope close to the tackle, and I saw the post move and I made two jumps, and the second jump was right here on the sill, and when I got on the sill with my foot, the post struck me as it fell; struck me right on the back. Q.

How big a post was it? A. 12 by 14 and it was green timber. Q. How long? A. Between eight and nine feet, I think. It was all I could do to carry my end. It was all we could do to carry the post over there. Q. Now, when the post was in this position, as you have shown, with the tenon in the mortise and Brandt holding it, did it require any great strength to hold it in position? A. No, a ten-year-old boy could hold the post, if he would not let go. Of course the moment you pull on the tackle, that is the way it went (indicating). Q. Did you hear any warning cry at all before you were struck? A. No, I never heard anything, only when the post hit me, I let out a yell."

It was claimed by respondent at the trial, and is also claimed here, that Mr. Brandt was a vice principal, and that he was negligent in not warning respondent that the post was about to fall, and also negligent in placing the sling near the bottom of the post instead of near the top. It is claimed by the appellant that the evidence shows Mr. Brandt was not a foreman and had no more authority over respondent than respondent had over Mr. Brandt; in other words, that Mr. Brandt and respondent were simply fellow servants working together, with no authority the one over the other. We may assume, however, for the purposes of this case that Mr. Brandt was a foreman for the purpose of directing the work, and therefore had control of the respondent. Still, the respondent's evidence makes it plain that the negligence which caused the injury was the negligence of a fellow servant in a mere detail of the work. It is not claimed that proper appliances were not furnished by the master. Respondent states that: "Brandt held the post and I thought he was going to hold it, and I did not suppose he would let it go . . . I just happened to look up and see Brandt had let go of the post and had his hand here on the rope close to the tackle. . . . A ten-year-old boy could hold the post if he would not let go." In holding the post Mr. Brandt was performing a mere detail of the work. He was not performing any nondelegable duty of the master. If he was

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negligent in letting go of the post with his hands and attempting to hold it by the tackle, the negligence in that respect was clearly the negligence of a fellow servant for which the master was not responsible. This case in this respect is controlled by the case of *Jock v. Columbia & Puget Sound R. Co.*, 53 Wash. 437, 102 Pac. 405.

The respondent relies upon the rule stated in *Nelson v. Willey S. S. & Nav. Co.*, 26 Wash. 548, 67 Pac. 237; *O'Brien v. Page Lumber Co.*, 39 Wash. 537, 82 Pac. 114; *Dossett v. St. Paul & Tacoma Lumber Co.*, 40 Wash. 276, 82 Pac. 273, and other cases holding that, where the master directs a dangerous agency into motion without warning, and injury results to the servant, the master is liable. That rule cannot apply to this case because, if Brandt represented the master, he directed no dangerous agency into action. He was holding a post with his hands. A ten-year-old boy could have held it. He took his hands from the post and attempted to hold it by means of a rope. The post fell without his volition, so far as the evidence shows. If that was negligence, it was his own negligence and not that of the master.

Respondent also urges that, if the sling to which the block and tackle were fastened had been placed nearer the top of the post, the post could not have fallen, and that the placing the sling near the bottom was a negligent method of conducting the work. But this method of placing the sling, according to respondent's testimony, was not the proximate cause of the post falling. Mr. Brandt could have held the post with his hands, as he did at first. But he let go of it with his hands and attempted to hold it by a rope, and the post fell on that account. The proximate cause of the post falling, therefore, was the fact that Mr. Brandt let go of it with his hands. Under the facts, as proven by the respondent, the negligence which caused the injury was so clearly that of a fellow servant that no liability can be attributed to the master.

The judgment must therefore be reversed, and the cause dismissed.

RUDKIN, C. J., DUNBAR, CROW, and PARKER, JJ., concur.

[No. 7620. Decided July 26, 1909.]

PACIFIC NORTHWEST INVESTMENT SOCIETY, *Appellant*, v.
JOHN G. CUNNINGHAM, *Respondent*.¹

BILLS AND NOTES — CONSIDERATION — CONTRACTS — FORFEITURE CLAUSE—WAIVER. A note given in payment for a rate installment on an investment bond, the bond stipulating for annual payments and providing that the bond should be void in case the note is not paid upon maturity, is valid and upon sufficient consideration, where the holder of the bond elects to treat it as in force and sues upon the bond; since it can waive the provisions for its forfeiture, and the word "void" should be construed to mean "voidable."

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered May 14, 1908, dismissing an action on contract, upon sustaining objections to the introduction of any evidence. Reversed.

Merritt, Oswald & Merritt, for appellant.

Kenyon & Setters, for respondent.

Crow, J.—Action on a promissory note by Pacific Northwest Investment Society, a corporation, against John G. Cunningham. When the case was called for trial, the defendant interposed an objection to the introduction of evidence, contending that the amended complaint did not state a cause of action. The trial court sustained the objection and dismissed the action. Plaintiff has appealed.

The only question before us is the sufficiency of the amended

¹Reported in 103 Pac. 9.

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complaint. Its averments material to this appeal read as follows:

"(2) That on the 29th day of June, 1906, the defendant made and executed his promissory note to plaintiff in the words and figures following, to wit:

"\$256.50

Spokane, 6-29-06.

"'On the 1st day of October, 1906, for value received, I promise to pay to the Pacific Northwest Investment Society at its offices in the Lindelle block, Spokane, Washington, the sum of (256.50) two hundred fifty-six and 50-100 dollars, with interest thereon from date until paid at 6% per annum; if not paid at maturity, to draw interest at the rate of 9% per annum until paid.

"'This note is given for a rate installment on an Investment Bond No. — to be issued by said Pacific Northwest Investment Society for \$10,000 in my favor and is non-negotiable.

"'In case this note is not paid at maturity the said Bond No. — shall be void and of no effect. (Signature) John G. Cunningham.'

"(3) That for and in consideration of said note the plaintiff did on the first day of July, 1906, make, issue and deliver to defendant the investment bond referred to in said note and for which said note was given to pay a rate installment upon, which said investment bond defendant received, accepted, kept and retained and does still keep and retain, a copy of said investment bond is hereunto annexed, made a part hereof and marked 'Exhibit A.'

"(4) That no part of said note, either the principal or interest, has been paid; the whole thereof is past due, all of which the defendant has refused to pay, although demanded so to do."

The bond referred to as Exhibit A in part reads as follows:

"No. 479.

\$10,000.

"Pacific Northwest Investment Society, Incorporated.

"This is to certify that in consideration of the payment of two hundred fifty-six and 50-100 dollars annually on the first day of July in advance during the period of twenty years from the date hereof The Pacific Northwest Investment Society hereby promises to pay to John G. Cunningham or

to the recorded owner hereof, at the expiration of said period, upon presentation of this bond to the society at its office in the city of Spokane, the sum of ten thousand dollars in gold coin of the United States of the present standard of weight and fineness, being the full sum of all rate installments hereon with interest on same from due date to maturity at 6 per cent per annum, compounded annually. Whenever interest is provided for herein, such interest shall be compounded annually as herein provided. This bond is subject to the 'Privileges and Provisions' hereon endorsed, which are hereby referred to and made a part of the same.

"In witness whereof, etc."

Then follow statements of certain privileges and provisions of the bond which need not be here stated.

The respondent contends that, if the note which was given for a rate installment was paid, the rate installment itself would be paid, otherwise not; that the giving of the note and the delivery of the bond were one transaction; that the two instruments created a single contract which by its terms expressly provided that, if payment of the sum mentioned in the note should not be made at maturity, the bond should be null and void; that by reason of the nonpayment of the note the bond did become void; that all consideration for the note thereupon failed, and that on the allegations of the amended complaint the appellant was not entitled to recover. These contentions cannot be sustained. The amended complaint states a cause of action. The note stipulated that, if it should not be paid at maturity, the bond should become void and of no effect; but such stipulation was made for the appellant's protection and benefit, and appellant could at its option either enforce or waive the same. By the terms of the bond delivered to respondent and still retained by him, the rate installments were payable annually. The appellant evidently took the note in payment of the first installment. From the date of the note until its maturity the bond was undoubtedly a valid and existing contract. If nonpayment of the note avoided such contract, the respondent by his own

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default not only availed himself of the stipulation made for appellant's benefit, but at the same time relieved himself from liability or indebtedness to appellant, while retaining possession of the bond. We cannot assume that the parties intended to make no contract, nor that they were engaged in the idle pastime of executing worthless instruments. To adopt respondent's construction would in effect be a holding that the note and bond were to be valid or not at his option, as he might determine, and without regard to any rights of the appellant. The note was undoubtedly accepted in payment of the first rate installment, notwithstanding respondent's contention to the contrary. By instituting this action appellant elected to waive the stipulation inserted therein for its benefit. It also elected to continue the bond, and enforce respondent's liability upon the note.

"It is not unusual to stipulate in contracts that they shall be 'void' under certain circumstances, and in view of the inaccurate use of the word 'void,' heretofore referred to, it generally becomes necessary to ascertain the precise sense in which that word is used. The general rule is that where such stipulations are inserted for the sole benefit of one of the parties, the word 'void' is to be construed as though the contract read 'voidable.' Thus, provisions in leases, that if the tenant shall not with due promptness perform his covenants to build, repair, insure, pay rent, and the like, the lease shall be 'void,' or 'utterly null and void, to all intents and purposes,' etc., are held to mean voidable at the instance of the lessor." 29 Am. & Eng. Ency. Law (2d ed.), p. 1070.

See, also, *Sadler v. Niesz*, 5 Wash. 182, 31 Pac. 630, 1030; *Van Shaack v. Robbins*, 36 Iowa 201. We hold that the word "void," here used, should be construed to mean voidable at appellant's election.

The judgment is reversed, and the cause remanded for a new trial.

RUDKIN, C. J., MOUNT, DUNBAR, FULLERTON, and GOSE, JJ., concur.

[No. 8068. Department One. July 26, 1909.]

J. H. DAY *et al.*, Respondents, v. WILLIAM H. RICHARDSON,
Appellant.¹

CONSTITUTIONAL LAW—CLASS LEGISLATION—PUBLIC LANDS—SALES—PURPOSES. An act authorizing the sale of certain school lands for cemetery purposes, is not unconstitutional as granting special privileges to any citizen or class of citizens, in violation of Const., art 1, § 12.

Appeal from a judgment of the superior court for Columbia county, Miller, J., entered June 30, 1908, upon findings in favor of the plaintiffs, upon the pleadings and stipulated facts, in an action of ejectment. Affirmed.

William H. Richardson, pro se.

Troy & Sturdevant, for respondents.

MORRIS, J.—The legislature, in the year 1901, passed an act, being Laws 1901, chap. 150, authorizing the board of appraisers and the commissioner of public lands to sell certain lands in Columbia county for cemetery purposes, at not less than \$10 an acre. The respondent Day purchased said lands for said purposes under said authorization, on March 20, 1902, and subsequently conveyed a three-fourths interest in them to the other respondents. On March 20, 1905, the state of Washington sold lands in Columbia county to appellant, the description of which included the land sold to Day. On November 25, 1907, while respondents were in possession of the lands for cemetery purposes, the appellant, claiming title under his deeds, entered upon the lands, tore down a fence erected by respondents, and ousted them therefrom. Thereupon respondents brought this action to recover their possession, with damages for the act of appellant in destroying the fence. Issue being joined, the cause was submitted upon the pleadings and stipulated facts, resulting in a decree

¹Reported in 103 Pac. 8.

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Statement of Case.

in favor of respondents, awarding them the possession of the land, with damages amounting to \$40.25.

The only error suggested by appellant is one based upon his contention that the act of 1901, under which the land was sold to Day, is unconstitutional. No section of the constitution is cited which renders the act invalid, and we have been unable to find any. Appellant suggests it was class legislation, because the lands when purchased could be put to only one use. This was not an act granting to any citizen or class of citizens any special privilege, and hence not in violation of the constitution, art 1, § 12. Any person was privileged to buy, who was willing to pay the price, and the price fixed complied in all respects with the law then existing fixing the price at which school lands might be sold.

Finding no error, the judgment is affirmed.

RUDKIN, C. J., FULLERTON, CHADWICK, and GOSE, JJ.,
concur.

[No. 8074. Department One. July 26, 1909.]

SILAS A. GILSON, *Appellant*, v. CASCADE LUMBER COMPANY
et al., *Respondents*.¹

WATERS—RIPARIAN RIGHTS—OBSTRUCTIONS—ACT OF GOD—QUESTION FOR JURY. Whether floods and an ice jam were so unusual and extraordinary as to be deemed an "act of God" is a mixed question of law and fact, to be determined by the jury under proper instructions, in an action by a riparian owner for damages for obstructing the stream.

WATERS—OBSTRUCTIONS—DAMAGES—NEGLIGENCE. Damages from obstructions in a river, causing an overflow of lands, may be recovered irrespective of negligence on the part of defendant in the maintenance of dams, booms, or piers near plaintiff's lands, as the injury is not the natural result of the use of the stream as a highway.

Appeal from a judgment of the superior court for Yakima county, Kauffman, J., entered March 19, 1908, in favor of

¹Reported in 103 Pac. 11.

the defendants by direction of the court, after trial before the court and a jury, in an action of tort. Reversed.

F. A. Luse, Cull & Davis, and H. J. Snively, for appellant.
Englehart & Rigg, for respondents.

MORRIS, J.—The appellant brought this action to recover damages, alleged to have been caused to his lands by the overflow of the Yakima river in November, 1906, and in February and May, 1907, through the negligence of the respondents in the construction and maintenance of their dam, boom, and piers in the river adjacent to appellant's lands, so as to cause the water to back up and overflow appellant's lands, causing the several items of damage complained of. The answer was a general denial, but on the trial of the cause the respondents sought to show that the floods and ice jam causing the damage were so unprecedented and so unusual in their extent and character, as to fall within what the law defines as "the act of God." The appellant sought to meet this evidence by attempting to show floods in prior years which were as great as, if not greater than, the floods complained of, upon which to base his theory that it was the duty of the respondents to have anticipated and properly guarded against the floods claimed to have caused the damage. At the conclusion of appellant's case in chief, the case was dismissed as to the Cascade Lumber Company, upon the ground that, if any act of the defendants caused any damage to appellant's lands, it was the act of the Yakima Boom Company. No exception appears in the record to this ruling.

At the close of appellant's rebuttal evidence, a motion was made to the court to withdraw the case from the jury and render judgment in favor of defendants upon several grounds; among others, that the floods and ice jam were so unusual and extraordinary as to be deemed the act of God. This motion was granted, and upon entry of judgment in favor of defendants, plaintiff appeals, alleging this ruling of the court as error.

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"The act of God," as that expression is known in the law, is a mixed question of law and fact. The defining and limitation of the term, its several characteristics, its possibilities as establishing and controlling exemption from liability, are questions of law for the court; but the existence or nonexistence of the facts upon which it is predicated are questions for the jury. The court could not, in this instance, have determined that the floods were unusual or unprecedented, since that is a determination of a fact depending upon evidence to establish it. The province of the court was to define to the jury in proper instructions what would in this instance be regarded by the law as an act of God, and leave to the jury the determination of whether or not the evidence was sufficient to create and establish such a situation.

In view of a new trial being ordered, we deem it proper to refer to one other contention discussed upon the argument and in the briefs. Respondents assert that they are entitled to judgment in any event, because of the failure of appellant to show his damage was the result of negligence, and cite *Mitchell v. Lea Lumber Co.*, 43 Wash. 195, 86 Pac. 405, 9 L. R. A. (N. S.) 900; while appellant contends that the true rule as established by this court is that, if his damage was caused by obstructions in the river created by respondents, he is entitled to recover irrespective of negligence; citing *Watkinson v. McCoy*, 23 Wash. 372, 63 Pac. 245, and other cases in which a similar doctrine is announced. The latter rule has become the established doctrine of this court. *Watkinson v. McCoy*, *supra*; *White v. Codd*, 39 Wash. 14, 80 Pac. 836; *Ingram v. Wishkah Boom Co.*, 35 Wash. 191, 77 Pac. 34; *Matthews v. Belfast Mfg. Co.*, 35 Wash. 662, 77 Pac. 1046; *Burrows v. Grays Harbor Boom Co.*, 44 Wash. 630, 87 Pac. 987.

The case of *Mitchell v. Lea Lumber Co.*, cited by respondents, does not announce a contrary rule. In that case the rule announced is that no damages can be recovered for in-

juries which are the natural result of the use of the stream as a highway. The court establishes a rule where the damage is caused by use of the river in its natural condition, in which there can be no recovery without a showing of negligence; while in *Watkinson v. McCoy* and other like cases, a rule is established where the damage is caused by obstructions, splash dams, and other causes created by the user of the river, in which case the injury must be compensated for irrespective of negligence, so long as it can be attributed to the obstruction created. There is no conflict in these holdings. The allegations of the complaint in the present case bring it within the case of *Watkinson v. McCoy*, and there could be a recovery for any injury sustained which could be attributed to the creation of the dam, piers, and boom created by the respondents. We do not think the contract set out as Exhibit A is in any wise controlling of any question involved in this action.

The withdrawal from the jury being error, the judgment is reversed and the cause remanded for a new trial.

RUDKIN, C. J., FULLERTON, CHADWICK, and GOSE, JJ., concur.

[No. 8189. Department One. July 27, 1909.]

THE CITY OF TACOMA, *Respondent*, v. NISQUALLY POWER
COMPANY, *Appellant*.¹

EMINENT DOMAIN—PROCEEDINGS—APPEAL—DECISIONS APPEALABLE.
An order adjudging a public use and necessity in condemnation proceedings, brought by a city under Laws 1907, p. 316, is reviewable on appeal from the final judgment, and therefore is not appealable prior thereto; since Bal. Code, § 6500, subd. 1, authorizes the review, on appeal from the final judgment, of any order made before judgment, and Laws 1907, p. 316, § 51, provides for appeals in condemnations as in other civil actions.

¹Reported in 103 Pac. 49.

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Opinion Per RUDKIN, C. J.

Appeal from an order of the superior court for Pierce county, Easterday, J., entered July 6, 1909, after a hearing before the court, adjudging a public use and necessity, in condemnation proceedings. Appeal dismissed.

Hayden & Langhorne, for appellant.

T. L. Stiles, Frank R. Baker, and Frank A. Latcham, for respondent.

RUDKIN, C. J.—The city of Tacoma instituted proceedings in the court below to condemn and appropriate certain lands, water and water rights, in furtherance of its plan to construct a power plant to supply the city with electricity for light and power purposes. The proceedings were instituted under chapter 153 of the Laws of 1907, page 316, enabling certain cities to exercise the right of eminent domain. The present appeal is prosecuted from an order adjudging the contemplated use to be a public one, and that public necessity required the prosecution of the enterprise.

The city of Tacoma has interposed a motion to dismiss the appeal on the ground that the order in question is not appealable, and can only be reviewed on appeal from the final judgment in the cause. Section 51 of the act under which the proceedings were instituted provides in part as follows:

“Except as herein otherwise provided, the practice and procedure under this act in the superior court and in relation to the taking of appeals and prosecution thereof, shall be the same as in other civil actions, but all appeals must be taken within thirty days from the date of rendition of the judgment appealed from.” Laws 1907, p. 316, § 51.

In the case of *Puyallup v. Lacey*, 43 Wash. 110, 86 Pac. 215, we held that an order adjudicating the question of public use and public necessity was reviewable on appeal under a similar statutory provision, and both parties to the present controversy concede that that rule is applicable here. They only differ as to the method of review, the appellant

contending that the order itself is appealable, while the respondent contends that a review can only be had on appeal from the final judgment in the cause, as already stated. The language of this court in *State ex rel. Northern Pac. R. Co. v. Superior Court*, 46 Wash. 303, 89 Pac. 879, gives color to the appellant's contention, for there the court said:

"In *Puyallup v. Lacey*, 43 Wash. 110, 86 Pac. 215, we held that this language made the general statutes relating to appeals applicable to such proceedings, and that under these statutes an appeal would lie from the order adjudging that the contemplated use for which the property is sought to be taken is really a public use, as well as from the order fixing the sum to be paid for the property taken or damaged."

From this language it might be inferred that the order adjudicating the question of public use is itself appealable, but no such question was then before the court. The court was simply considering the question whether the relator had a remedy by appeal in any form, and the statement as to what was decided in *Puyallup v. Lacey* is inaccurate if not misleading. The question here presented was not involved in the *Puyallup* case. There the appeal was prosecuted from a final judgment of dismissal, and the question of the right to appeal from an order of this kind was neither discussed nor considered. The question is therefore an open one in this court.

Subd. 1 of Bal. Code, § 6500 (P. C. § 1048), provides that an appeal will lie,

"From the final judgment entered in any action or proceeding, and an appeal from any such final judgment shall also bring up for review any order made in the same action or proceeding either before or after the judgment, in case the record sent up on the appeal, or any supplementary record sent up before the hearing thereof, shall show such order sufficiently for the purposes of a review thereof."

There is no room to controvert the proposition that the order from which the present appeal is prosecuted is an or-

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der made before judgment in the condemnation proceedings, within the purview of this statute, and that such order may be reviewed on appeal from the final judgment. It is the policy of the law, and has heretofore been the policy of this court, to discourage a multiplicity of appeals and to deny an appeal from all orders that may be reviewed on appeal from the final judgment, unless an appeal is expressly given by statute. *Windt v. Banniza*, 2 Wash. 147, 26 Pac. 189; *Schlotfeldt v. Bull*, 18 Wash. 242, 43 Pac. 33; *Green v. Moore*, 24 Wash. 241, 64 Pac. 151.

In *Windt v. Banniza*, the court said:

“Ordinarily speaking, every step taken in an action is a proceeding; and, if every proceeding were appealable, then this court might be compelled to sit in judgment upon the ruling of the lower court in changing the place of trial of an action, or in overruling a demurrer. We do not believe the legislature intended that the word should be understood in any such sense. But we do believe that the court should not depart from the well known and established principles of the common law, and permit a cause to be brought before it by piecemeal for review, unless clearly authorized so to do by legislative enactment.”

Authorities have been cited from other jurisdictions, but their statutes relating to appeals, and more especially their statutes relating to eminent domain proceedings, differ so radically from our own that the cases throw but little light upon the general question under discussion. Thus in *New Milford Water Co. v. Watson*, 75 Conn. 237, 52 Atl. 947, 53 Atl. 57, an appeal was allowed from an order of the superior court appointing appraisers under the Connecticut eminent domain statute, but in speaking of such an order the court said:

“It ordinarily closes the judicial part of the proceedings, what remains to be done being of an administrative character, as the appraisers discharge only a *quasi* judicial function.”

In *In re St. Paul & N. P. R. Co.*, 34 Minn. 227, 25 N. W.

345, and *State ex rel. Chicago & N. W. R. Co. v. Oshkosh etc. R. Co.*, 100 Wis. 538, 77 N. W. 193, similar orders were held to be appealable. In *Wheeling etc. Bridge Co. v. Wheeling Bridge Co.*, 138 U. S. 287, 34 L. Ed. 967, it was held that a writ of error would lie to the supreme court of appeals of West Virginia to review a judgment of that court affirming an order appointing appraisers under a condemnation statute, but the court held the order final because it had been so held in the state court. On the other hand, in *Luxton v. North River Bridge Co.*, 147 U. S. 337, 13 Sup. Ct. 356, 37 L. Ed. 194, speaking of the finality of an order of the circuit court of the United States for the district of New Jersey appointing appraisers under the New Jersey statute, the court said:

"The action of that court in this case, as in other cases on the common law side, is not reviewable by this court by writ of certiorari; *United States v. Young*, 94 U. S. 258, 24 L. Ed. 153; but only by writ of error, which does not lie until after final judgment, disposing of the whole case, and adjudicating all the rights, whether of title or of damages, involved in the litigation. The case is not to be sent up in fragments by successive writs of error."

And so here. An appeal will only lie from the final judgment disposing of the whole case and adjudicating all the rights involved in the litigation, whether of public use and public necessity or of damages. The case is not to be brought to this court in fragments by successive appeals.

The motion to dismiss is therefore granted.

FULLERTON, CHADWICK, and GOSE, JJ., concur.

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Opinion Per MOUNT, J.

[No. 7980. Department Two. July 29, 1909.]

*In the Matter of the Improvement of ELLIOTT AVENUE AND
MILWAUKEE STREET, SEATTLE.*¹

MUNICIPAL CORPORATIONS—ASSESSMENTS—BENEFITS—APPEAL—REVIEW. The assessments of benefits from a local improvement, made by the commission appointed for that purpose, will not be disturbed on appeal where there were differences of opinion and conflicting evidence; and it is immaterial that the ownership of several lots was taken into consideration if the commission arrived at the correct result.

Appeal from a judgment of the superior court for King county, Tallman, J., entered September 10, 1908, confirming an assessment roll, after a hearing before the court on the merits. Affirmed.

Carkeek & McDonald and *Peters & Powell*, for appellants.
Scott Calhoun and *King Dykeman*, for respondent.

MOUNT, J.—This appeal is from an order confirming an assessment roll in an improvement district in the city of Seattle. The appellants owned certain lots in block 29, of Northern Addition. They objected to the assessment against their lots for the reason that the same were excessive, unequal and arbitrarily made. These objections were heard upon evidence introduced, and were overruled by the court. Appellants assign error of the court in not sustaining their objections to the roll, and in admitting evidence that appellants each owned several adjoining lots in the block, and that this fact was considered by the commissioners in making the assessment.

The record shows conclusively that the improvement was of benefit to this block No. 29. The fact of benefit is not disputed, but it is claimed that the lots in this block are assessed higher than lots in other blocks. But it is apparent from an

¹Reported in 103 Pac. 20.

inspection of the plat that this block is benefited much more than surrounding blocks, and therefore should bear a greater portion of the cost of the improvement. The first assignment of error in this case is based upon the facts, and depends upon whether the assessments were too high or not. This is largely a matter of opinion. In this class of cases we said, in *In re Seattle*, 50 Wash. 402, 97 Pac. 444, "Opinions will differ widely . . . as to the benefits to accrue to the different properties within the district; but this court cannot substitute its judgment for the judgment of those whom the law has charged with the duty of establishing the district and apportioning the cost, whenever such difference of opinion may arise." Opinions do differ in this case between the commissioners who made the assessment and the witnesses called by the appellants. The block No. 29 lies to the west of Elliott avenue, which is improved by being widened and extended. The lots in this block fronting upon this avenue were forty feet wide, by about the same in depth. The lots to the rear of these small lots were one hundred and fifty feet deep by forty feet wide. The fact that the title to these long and short lots was in the same person was considered by the commissioners in making the assessment. Appellants argue that the assessment should be based upon the benefit to the property alone, and not to the owner, and this is the rule. But if the amount determined upon is right, it cannot be changed because the result was arrived at by the wrong method. In *In re Western Avenue*, 47 Wash. 42, 91 Pac. 548, this court said: "The commissioners are chargeable with the result of their work, and not the manner by which they arrive at that result." As seen above, the evidence in this case is conflicting. It fails to convince us that the assessments upon the appellants' lots were excessive or unjust. The order appealed from must therefore be affirmed.

RUDKIN, C. J., DUNBAR, CROW, and PARKER, JJ., concur.

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Opinion Per Gose, J.

[No. 7847. Department One. July 29, 1909.]

JOHN W. CUPPLES, *Appellant*, v. J. A. LEVEL *et al.*,
Respondents.¹

EXECUTION—LEVY—HOW MADE—PERSONAL PROPERTY—GROWING CROPS. Under Bal. Code, §§ 5269, 5362, requiring personal property capable of manual delivery to be levied upon by taking it into custody, a levy upon a growing crop of wheat made by posting notices of sale and delivering a copy of the execution and notices to the judgment debtors, is not valid as to subsequent purchasers from the debtors.

LANDLORD AND TENANT—LEASE—CROPS—ASSIGNMENT—CONSENT OF LESSOR—WAIVER OF RE-ENTRY. The landlord's consent to the assignment of a lease is not necessary to transfer title to the crop where there was no nonassignment clause in the lease, nor where the crop had been harvested and marketed by the assignees and the right of re-entry had been lost by nonaction of the lessor.

Appeal from a judgment of the superior court for Lincoln county, Warren, J., entered September 25, 1908, upon the verdict of a jury rendered in favor of the defendants, in an action of claim and delivery. Reversed.

Martin & Wilson, for appellant.

Merritt, Oswald & Merritt, for respondents.

Gose, J.—The appellant, on July 17, 1908, commenced this action under the claim and delivery statute, Bal. Code, § 5262 (P. C. § 854), by filing his affidavit and serving a copy thereof upon the respondent sheriff, and by giving to the sheriff the statutory bond; whereupon the appellant took possession of a growing crop which the sheriff had theretofore sought to seize under an execution on an ordinary money judgment. Upon the maturing of the crop, it was harvested and marketed by the appellant. The case was tried to a jury. From a judgment upon a verdict in favor of the respondents, this appeal is prosecuted.

The appellant has assigned numerous errors, but the view

¹Reported in 103 Pac. 430.

we take of the case limits the principal inquiry to the single question whether the sheriff had made a legal levy upon the property. A brief statement of the facts as they appear in the record will suffice. On March 7, 1907, the respondent O'Connor leased to Frank P. Bell and John M. Bell section 35, in township 22, range 35, in Lincoln county. The lease provided that the lessees should deliver to the lessor, as rental, "one-third free of charges" of all the grain grown upon the leased premises. It contained no covenants against assignment. On February 15, 1908, the lessees assigned the lease to one Sadie Wareham, stipulating in the assignment that it was "subject, nevertheless, to the rents and covenants in the said indenture contained." The lease, together with the assignment, was filed for record on the last-named date.

On April 7, 1908, the respondent O'Connor recovered a judgment against the Bells and Wareham, and on the 13th day of June following, an execution was issued thereon and placed in the hands of the sheriff for enforcement. On the 16th day of June, the respondent sheriff sought to levy on all the right, title, and interest of the execution defendants in the crop of grain then growing upon the leased premises. His return states:

"Said levy being made by delivering to the within named defendants a true copy of the within execution, and therewith a true copy of a notice of sale setting forth that the above described property would be sold on the 27th day of June, 1908."

Prior to the date set for the sale, the sheriff was restrained from making the same. The restraining order was dissolved on the 7th day of July, 1908, and on the following day the sheriff, without a further levy, posted notices stating that the sale would occur on the 18th day of July. Before the last named day, the affidavit and bond were served. On July 7, Sadie Wareham, for a recited consideration of \$1,600, conveyed to the appellant, by an instrument in writing, an undivided two-thirds of all the wheat then growing on the leased

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land. This instrument was filed for record July 8. The appellant was not a party to the proceeding in which the judgment was entered upon which the execution was issued and the attempted levy made. The court, *inter alia*, instructed the jury as follows:

"It is undisputed in this case that a valid levy was made upon this property by the sheriff. You have nothing to do with how the sheriff makes a levy whether he goes out and puts up notices or how, therefore it must be taken as affirmed by the evidence that a valid levy was made somewhere back in June, that testimony is here before you and not disputed. The evidence is undisputed that the sale under that levy was restrained by this court, that after that time that restraining order was set aside, and I instruct you that after the first levy the property was in the custody of the law and that during that time no person could acquire any title as against the sheriff, and as against that title could not acquire any title."

At the conclusion of the instructions, in answer to an inquiry by a juror, the court further instructed: "He can't be the owner now if not prior to the levy in June. He can't be the owner now unless before that time." Appellant properly excepted to these instructions, and has assigned error upon them.

It will be observed that the appellant acquired his interest in the subject-matter in litigation after the attempted levy. We have seen that the sheriff did not actually seize the property, and that he did nothing in the way of executing the writ except to post notices of sale and deliver a copy of the execution and notices to the judgment debtors. Did this constitute a constructive seizure? We think not. The code, Bal. Code, § 5362 (P. C. § 522), provides that, "personal property capable of manual delivery shall be attached by taking into custody," and § 5269 (P. C. § 864), provides that "property shall be levied on in like manner and with like effect as similar property is attached, and until a levy personal property shall not be affected by an execution." We think these are the only provisions of our statute touching the

levy of a writ of execution upon personal property. The return does not show that the sheriff went upon, or even saw, the property; nor did he constitute the judgment debtors, or either thereof, or any other person, his agent to keep possession of it. In fact, he had no possession, either actual or constructive, to intrust to another.

In *State v. Poor*, 4 Dev. & Bat. Law 384, 34 Am. Dec. 387, a constable having a writ of attachment in his possession sought to levy upon a growing crop without going on the land upon which the same was growing. He returned the writ indorsed: "Levied on a field of growing grain of Thomas Poor." Speaking to the legal effect of the attempted levy, it is said:

"We think that it was correctly held by his honor that the constable by indorsing on the writ of attachment in the manner set forth in the case, that he had levied on the growing crop of the defendant in the attachment, did not acquire the legal possession thereof. To the levy of a writ upon personal property—whether a writ of attachment or of execution—the law requires a seizure. If, in the nature of the thing, actual seizure be impossible, then some notorious act as nearly equivalent to actual seizure as practicable, must be substituted for it. The least that can be required in the levy on a growing crop is, that the officer should go to the premises, and there announce that he seizes the same to answer to the exigency of his writ."

In *Taffs v. Manlove*, 14 Cal. 47, 73 Am. Dec. 610, at pages 612-13, the court, in construing the acts necessary to constitute a levy on personal property, said:

"It may be admitted, as unquestionably the law is, that a levy may be good as against the defendant in the writ when it would not be good as to third persons. . . . But it cannot be necessary to pursue this inquiry. It is too plain for argument that there can be no levy when the officer does not even know the subject of the levy. As well might a sheriff stand in the street and levy upon the contents of a banking-house as to stand in a store door at midnight, and claim that merely by standing there and preventing any person from coming into the store he had levied on the contents,

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whatever they were, of the store; and this, without having any knowledge of the general nature of the stock, much less of the particular description or value."

In *Nighbert v. Hornsby*, 100 Tenn. 82, 42 S. W. 1060, 66 Am. St. 736, the sheriff was about to sell a certain lot of corn under execution, when a replevin action was instituted to recover possession and prevent the sale on the ground that no levy had been made. In holding the levy effectual, at page 738, the court said:

"It was sufficient if, as indicated by the evidence mentioned, he went into the presence of the property in question with the power and purpose then and there to seize it under a valid execution, and, by virtue of the writ, really assumed control of the property, as upon a manual seizure, with the plaintiff's knowledge, and, having done that, then left the property in the plaintiff's custody by his consent and with his promise to keep it safely until demanded for sale, first noting the fact of the levy upon another paper, and subsequently, in due season, making proper indorsement on the execution itself."

In *Jones v. Howard*, 99 Ga. 451, 27 S. E. 765, 59 Am. St. 231, the court, defining a levy upon personal property, at page 235, said:

"To the completion of a levy, seizure, either actual or constructive, is absolutely indispensable. Actual seizure is accomplished by a mancipation of the thing intended to be seized. A constructive seizure is accomplished by the actual reduction by the officer of the property intended to be seized to his own control. He must have brought such property so far under his subjection that he could exercise control over it. He must exercise or assume to exercise dominion by virtue of his writ. He must do some act for which he could be successfully prosecuted as a trespasser, if it were not for the protection afforded him by the writ."

"In general it may be said, that it [the levy] shall be such a custody as to enable an officer to retain and assert his power and control over the property, and so that it cannot probably be withdrawn, or taken by another, without his knowing it." *Hemmenway v. Wheeler*, 14 Pick. 408, 25 Am. Dec. 411, 413.

See, also, *Meyer v. Missouri Glass Co.*, 65 Ark. 286, 45 S. W. 1062, 67 Am. St. 927.

It is not necessary for us to decide whether a growing crop can be levied upon on a writ of execution or, if so, how or under what circumstances it can be subjected to such process. In this case there was no levy made, and at the close of the trial the court should have directed a verdict for the appellant. He had shown that he was the owner of the grain. There was no evidence to the contrary. The respondents contend that no rights were acquired by the assignment to Sadie Wareham, it not appearing that it was made with the lessor's consent. This position is untenable for three reasons, (1) because there is no nonassignment clause in the lease; (2) at the time of the trial the crop had been harvested and marketed; (3) if the lessor had an implied right of reentry in case of assignment without his consent, the right was lost by nonaction. This case is therefore distinguishable from *Tip-ton v. Martzell*, 21 Wash. 273, 57 Pac. 806, 75 Am. St. 838.

The judgment will therefore be reversed, with directions to the trial court to enter judgment for the appellant for the grain and its proceeds, and for costs of suit.

RUDKIN, C. J., CHADWICK, FULLERTON, and MORRIS, JJ., concur.

[No. 8023. Department Two. July 29, 1909.]

FRANK R. WARD, *Respondent*, v. NATIONAL LUMBER & BOX COMPANY, *Appellant*.¹

MASTER AND SERVANT—GUARDING MACHINERY—FACTORY ACT—STATUTES—CONSTRUCTION—EJUSDEM GENERIS. The factory act, Laws 1903, page 40, requiring the safeguarding of certain specified machines of various kinds, "and machinery of other or similar description" in factories, will not be confined to the subjects mentioned on the theory of *ejusdem generis*, but includes friction wheels not named, since the rule has no application where the specified subjects greatly differ from one another and where such construction would violate the evident intent of the legislature.

¹Reported in 103 Pac. 1.

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MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. An oiler is not guilty of contributory negligence, as a matter of law, in attempting to take hold of a grease cup with his left hand instead of his right, where it would have been inconvenient to do so, and it does not appear to have been any safer to use his right hand.

SAME—ASSUMPTION OF RISKS—OBVIOUS DANGERS. Knowledge that a grease cup was apparently too dangerous to be used, as conceived and constructed by the master, is not to be imputed to an oiler, where he had used it for three weeks without injury.

MASTER AND SERVANT—ASSUMPTION OF RISKS—NOTICE OF DANGER TO MASTER. It is not incumbent upon an oiler to report to the master as to the dangerous condition of machinery due to the original construction and arrangement, and not to want of repairs.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered January 8, 1909, upon the verdict of a jury rendered in favor of the plaintiff for personal injuries sustained by an employee in a factory. Affirmed.

W. H. Abel and A. M. Abel, for appellant.

Govnor Teats, Hugo Metzler, and Leo Teats, for respondent.

DUNBAR, J.—This is an appeal by the National Lumber & Box Company, from a judgment rendered against it in the sum of \$2,000, in a suit brought by respondent, Frank R. Ward, for personal injuries received by him in its employ. The injury was the loss of his left hand, which was cut and torn off between the grease cup and friction wheel while he was lubricating a bearing.

The friction wheel drives the set works to the double cut-off saw. In order to oil the bearing, it was necessary to mount a ladder and walk along a plank. The friction wheel revolved upon a shafting. The boxing of the shaft was fastened to a timber, known as a bridge tree. The oiler had to go in a stooping position, reach through between two horizontal timbers, and oil the bearing. To lubricate this bearing, there

was an oil extension pipe and patent cup, the pipe being between two and three feet long, fastened in the boxing, and extending therefrom to where the oiler stood. There was also a patent grease cup fastened in the boxing, consisting of a pipe about six inches long, with cup attached, screwed into the boxing at a distance of about three-fourths of an inch from the spokes of the friction wheel.

Ward had used the oil cup for the purpose of lubricating this bearing for about three weeks before the accident, when he found the grease cup placed there, as he supposed, for him to use; and from that time until the accident he did use the grease cup to lubricate the bearing. He testified that he had been instructed to economize the oil as it was very expensive, and to use the grease when it could be used, and that he was undertaking to follow out what he supposed was the will and desire of his employers in using the grease instead of the oil. In turning the grease cup, his hand was sucked in, as he says, by the wheel, and was cut off.

The case was tried to a jury. At the close of the respondent's case, motion was made for nonsuit, which motion was overruled. The case went to trial. The defense introduced testimony in support of its contention that the respondent had been guilty of negligence, and had assumed the risk, and that there was no negligence on the part of the appellant. The motion was repeated at the end of the whole case, and refused, and the case submitted to the jury, with the verdict mentioned above, viz., the sum of \$2,000, for which judgment was entered.

There are two principal contentions of the appellant in this case, viz.: (1) that the factory act does not in terms require friction wheels to be guarded, and that therefore the respondent should be charged with the assumption of risk in operating a machine which was noticeably dangerous; and (2) that the respondent was guilty of contributory negligence in operating said machine in the way he did operate it.

The factory act provides for reasonable safeguards for

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all vats, pans, trimmers, cut-off, gang edger, and other saws, planers, cogs, gearings, belting, shafting, couplings, set screws, live rollers, conveyors, mangles in laundries and machinery of other or similar description. The enacting clause is: "An act providing for the protection of employes in factories, mills or workshops where machinery is used." Laws, 1903, p. 40. The act further provides for ventilation and sanitary conditions, guarding of trap-doors and hatchways, etc.; so that it will be seen from a reading of the act that the evident intention of the legislature was to protect operatives in factories in every manner and in every particular in which they could be protected, consistent with the reasonable operation of the particular factory which was engaged in business. The appellant invokes the rule of *ejusdem generis*, and insists that the friction wheel, not being specified in the factory act and not being of the same kind or genus as any of the machinery specially mentioned, does not fall under the head of machinery of other or similar description, and that therefore the assumption of risk attaches in this kind of a case. Considering the whole scope of the factory act and the evident intention of the legislature, we are unable to reach the conclusion contended for by the appellant. There is no doubt that the general rule is that the general word must take its meaning and be presumed to embrace only things or persons of the kind designated in the specific words; but, as is said in 26 Am. & Eng. Ency. Law (2d. ed.), p. 610, the object of the rule in question being not to defeat but to ascertain and effectuate the legislative intent, it will not be applied where the application would be in the face of the evident meaning of the framers of the law. In other words, the maxim has no application where there is no room for construction but only when the meaning is not apparent from the language itself; and it is also said,

"Nor does the rule obtain where the specific words signify subjects greatly different from one another, for here the general expression might very consistently add one more

variety; in such case, the general term must receive its natural and wide meaning."

This is peculiarly the case under our statute, where the specific words signify subjects greatly different from one another, vats, pans, trimmers, cut-off, gang edger and other saws, planers, cogs, gearings, belting, shafting, coupling, set screws, live rollers, conveyors, mangles in laundries, etc., all or nearly all, being machinery or parts of machinery of different character. We think, in the face of the statute, it would be doing violence to the evident intention of the legislature to hold that the duty to guard the machinery in question was not imposed upon the millowner; and the testimony is undisputed that this machine could have been guarded without affecting the efficiency of its operation.

It is also strenuously contended that the respondent was guilty of contributory negligence in using a machine which was manifestly dangerous, and in using it in the manner in which he did use it. A persistent attempt was made during the trial of the cause, as shown by the record, to show that it was negligence for the respondent to take hold of the cup with his left hand instead of his right; but outside of the fact that there is nothing to indicate that the cup could not be manipulated as safely with the left hand as with the right, the testimony of all the respondent's witnesses, as well as his own testimony, was to the effect that it would have been inconvenient to have used his right hand owing to the manner in which the cup had to be approached by the oiler. We are speaking now exclusively of the testimony of the respondent, any conflicting testimony on that subject which was submitted by the appellant having been submitted to the discretion of the jury; and assuming that the testimony of the respondent was true, we are unable to determine that the use of this machine in the way in which it was used was contributory negligence as a matter of law.

Nor is it reasonable to our minds to impute to the respondent the knowledge of the dangerous condition of the machine

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to such an extent that it was apparently too dangerous to be used with safety, when the undisputed testimony shows that it had been used by the respondent for three weeks prior to the accident, and when it had been established, in the condition in which it existed, by the appellant itself. It could scarcely be said with reason that the minds of reasonable men could not differ on that subject, when the machine was conceived and constructed by the appellant, and placed there for practical operation by its employees.

There is some contention by the appellant that it was the duty of the oiler to report to the appellant when the machinery was found in a dangerous condition. But this duty and instruction certainly did not have reference to the original construction of the mill and arrangement of the machinery; but only to any machinery that had become dangerous by misplacement or accident of any kind.

On the whole we are unable to find any reversible error in the record, and the judgment will therefore be affirmed.

RUDKIN, C. J., MOUNT, CROW, and PARKER, JJ., concur.

[No. 8043. Department Two. July 29, 1909.]

THE STATE OF WASHINGTON, *Respondent*, v. P. C. HOSEY,
Appellant.¹

CRIMINAL LAW—EVIDENCE—REPUTATION OF ACCUSED—WITNESSES—COMPETENCY—RAPE. Witnesses who are well acquainted with the accused, and can testify that he is a good citizen "because he behaves himself, or is a moral man," are competent to testify to his reputation for good character and chastity, although they had not heard it discussed by others, and based their evidence on observation alone; especially in a prosecution for statutory rape.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered March 21, 1907, upon a trial and conviction of statutory rape. Reversed.

¹Reported in 103 Pac. 12.

Lester P. Edge and Joseph McCarthy, for appellant.

Fred C. Pugh, Don F. Kizer, and Chas. G. Cromwell, for respondent.

DUNBAR, J.—The information in this case charged the appellant with statutory rape upon one Elta Decker, a female child of the age of fifteen years. Trial was had to a jury, and a verdict of guilty as charged was rendered. Motion for a new trial was overruled, and the appellant was sentenced to imprisonment in the state penitentiary at Walla Walla for a term of six years. From a judgment of conviction, this appeal is taken.

It is assigned that the court erred in excluding the testimony of B. D. McDonald and of Austin Ready, in refusing to give certain instructions, and in permitting the prosecuting attorney, over the objection of defendant after the trial had commenced, to indorse upon the information the name of Briley as one of the witnesses for the state, and allowing Briley to testify during the trial.

For the purpose of proving the good character of the appellant, the witness McDonald was called. The appellant had resided with the witness McDonald and his family for the greater part of the year preceding the trial. On direct examination, McDonald testified that he knew what appellant's general reputation was for good citizenship and chastity, and that the same was good. On cross-examination the witness testified as follows:

“Q. How do you get at it? How do you tell what a man's reputation is? A. What I know of him. Q. Your observation of him? A. Yes, sir. Q. And talking with him? A. Yes, sir. Q. Knowing where he is and where he isn't? A. Yes. Q. You feel that you know about this young man? A. All that I know of him I have never seen anything wrong. Q. And that is what you are testifying from, what you know of him? A. Yes, sir. Q. From your personal observation during the time he has lived with you? A. Yes, sir. Q. What do you know about his good citizenship? A. As far as I know he is a good citizen. Q. What do you know about his

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good citizenship? A. I never seen anything wrong with him. Q. In what respect is he a good citizen? A. A man that behaves himself; behaves himself in every respect as long as I have known him."

The court instructed the jury that the testimony of Mr. McDonald should not be regarded by them, and it was thereby taken from their consideration. Mr. Ready, a prominent citizen of Spokane, testified that he had known the appellant in Spokane and other places for a period of twelve or fifteen years; that he had frequently seen him and talked with him in Spokane; that he had talked to Mr. McDonald about him, and that they were much impressed with him. Being asked by counsel: "Had he [appellant] been an immoral man would you have known it," the state interposed an objection, which was sustained by the court.

Under the old rule, it may be conceded that the testimony of these witnesses, especially of the witness McDonald, would not have been considered material; but that strict rule has been very much relaxed, and we think with good reason; for reputation, such as was proved under the old rule, was only what a certain given number of people thought about a man, and was but an enlargement in numbers of what one man thought or knew about him, and there seems to be no good reason why the opinion and knowledge of the one man should be excluded because he is not able to duplicate that opinion by giving the names of others who have expressed their opinion as to his reputation. It is said in 3 Ency. of Evidence, p. 43:

"By the great weight of current authority, one who has been personally acquainted with another for a considerable length of time and who has been in a position where he probably would have heard that other's reputation talked about were it the subject of comment, and who has never heard it questioned, may testify to the good character of such person;"

citing many cases to sustain the text; among others, *Foerster v. United States*, 116 Fed. 860, where it was held that the

fact that one who has long been acquainted with a witness and his associates has never heard any discussion or remarks concerning his character, is excellent evidence of his good character and good reputation; and that the testimony that one's reputation for truth and veracity is good, is not rendered incompetent by the statement of the witness on cross-examination that it had never been brought up to him before, the trial court in passing on the objection to the testimony saying: "A person whose reputation is good is never discussed; but a man whose reputation is bad is discussed among others." The appellate court held that this was a proper ruling by the trial court, saying:

"This ruling, and the remarks accompanying it, are specified as error. But the ruling was right, and the remarks of the court stated a well-settled rule of evidence. The reputation and character of one who quietly and faithfully discharges his legal, civil, and religious duties give little occasion for remark, and are seldom the subject of discussion. Common experience teaches us that the fact that one's character and reputation are not discussed is excellent evidence that they give no occasion for censure, and that they are good, and this is the established rule of law."

The announcement of the court in that case might well apply to the answer made by the witness to the question, "In what respect is he is good citizen?" viz: "A man that behaves himself; behaves himself in every respect as long as I have known him." The court in that case, among other authorities, cited Jones on Evidence, § 865, where it was said:

"But it is not a necessary condition that he should have heard the reputation of the witness discussed or called in question, since it is to be presumed that those who are well acquainted with the witness and his associates would have heard of the fact, if his reputation for veracity was often assailed, or called in question. If the testimony were not allowed under such circumstances, the most respectable man in the community might fail in being supported, if his character for truth should happen to be attacked. Living all his life above suspicion, his truth would rarely be the subject

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of remark. A neighbor might be obliged to admit, as in this case, that he had never heard it spoken of, and yet be undoubtedly competent to sustain him."

This is also the rule of law announced by 3 Rice on Evidence, § 380, where it is said:

"The propriety of the rule, permitting negative evidence of good character, is gradually forcing itself upon the recognition of the courts, and there is a current and modern authority rapidly forming in support of it. Mr. Taylor, in his work on Evidence, after observing that the term 'character' is not synonymous with 'disposition,' but simply means reputation, or the general credit which a man has obtained in public opinion, observes as follows of the practice of the English judges to this point: 'Aware that the best character is generally that which is the least talked about,' they have found it necessary to permit witnesses to give negative evidence on the subject, and to state that 'they have never heard anything against the character of the person on whose behalf they had been called.' 'Nay, some of the judges,' he continues, 'have gone so far as to assert that evidence in this negative form is most cogent proof of a man's good reputation,'"

citing *Reg v. Cory*, 10 Cox C. C. 23, where it was said by Cockburn, Ch. J.;

"I am ready to admit that negative evidence to which I have referred, of a man saying 'I never heard anything against the character of the person of whose character I come to speak, should not be excluded. I think, though it is given in a negative form, it is the most cogent evidence of a man's good character and reputation, because a man's character does not get talked about until there is some fault to be found with him. It is the best evidence of his character, that he is not talked about at all. I think the evidence is admissible in that sense."

In *State v. Lee*, 22 Minn. 407, 21 Am. Rep. 769, the court announces that the strict and technical rule which we have before mentioned has become relaxed, saying:

"A very sensible and commendable instance of the relaxation of the old and strict rule is the reception of negative

evidence of good character—as, for example, the testimony of a witness who swears that he has been acquainted with the accused for a considerable time, under such circumstances that he would be more or less likely to hear what is said about him, and has never heard any remark about his character—the fact that the person's character is not talked about at all being, on grounds of common experience, excellent evidence that he gives no occasion for censure, or, in other words, that his character is good.”

In further discussion, the court said:

“As it is, then, the *fact* of disposition which is important and material, there can be no reason why this fact may not be proved by any witness who knows what it is. There is certainly no reason why general repute is not better or more satisfactory evidence of disposition than the testimony of one who knows what the disposition in question is from his own personal observation. If it could properly be objected that the latter kind of testimony would be matter of opinion, a like objection might be made to evidence of general repute as but an aggregation of opinions. But evidence of the disposition of a person, by one who knows such disposition from personal observation, is not evidence of opinion in any objectionable sense.”

It would seem useless to quote further authority. The whole trend of modern opinion is in the direction which we have indicated, and we think, therefore, that the court erred in taking the testimony of McDonald and Ready from the jury, as the character of the appellant was a question which should have gone to the jury. It may appropriately be said that, in this kind of a case, which it is difficult to defend against, and where a man's character might be the only defense that he could present to the jury, courts ought not to be too technical in rejecting testimony tending to prove character.

We have examined the other assignments of error, but considering the instructions asked in connection with the instructions already given by the court, we think no error was

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Citations of Counsel.

committed in denying the instructions asked for, or in any other particular.

But for the reasons assigned, the judgment will be reversed.

RUDKIN, C. J., MOUNT, CROW, and PARKER, JJ., concur.

[No. 8049. Department Two. July 29, 1909.]

THE CITY OF SPOKANE, *Respondent*, v. J. R. BAUGHMAN,
Appellant.¹

INTOXICATING LIQUORS—SALE WITHOUT LICENSE—CLUBS—FURNISHING TO MEMBERS. The serving of intoxicating liquors by a social club exclusively to its members, and not for profit, at a price fixed by the club, which is charged to the account of the members, is a sale within the meaning of an ordinance to regulate the sale of liquors and prohibiting their sale without first obtaining a license; since the matter of making a profit is immaterial and the principal object of the law is regulative.

SAME—BARROOMS—SOCIAL CLUBS. The maintenance by a social club of a room wherein to furnish liquors to members to be drunk on the premises is the conducting of a barroom, within the meaning of an ordinance regulating the liquor business and barrooms, especially where the law makes drug stores the only exception.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered October 17, 1908, upon a trial and conviction of selling liquor without a license. Affirmed.

Graves, Kizer & Graves, for appellant, cited: *Black, Intoxicating Liquors*, § 142; *State ex rel. Bell v. St. Louis Club*, 125 Mo. 308, 28 S. W. 604, 26 L. R. A. 573; *State ex rel. Columbia Club v. McMaster*, 35 S. C. 1, 14 S. E. 290, 28 Am. St. 826; *People v. Adelphi Club*, 149 N. Y. 5, 43 N. E. 410, 52 Am. St. 700, 31 L. R. A. 510; *Piedmont Club v. Commonwealth*, 87 Va. 540, 12 S. E. 963; *Koenig v. State*, 33 Tex. Cr. 367, 26 S. W. 835, 47 Am. St. 35; *State v.*

¹Reported in 103 Pac. 14.

Austin Club, 89 Tex. 20, 33 S. W. 113, 30 L. R. A. 500; *Manassas Club v. Mobile*, 121 Ala. 561, 25 South. 628; *Cuzner v. California Club* (Cal.), 100 Pac. 868; *Commonwealth v. Pomphret*, 137 Mass. 564, 50 Am. Rep. 340; *Klein v. Livingston Club*, 177 Pa. 224, 35 Atl. 606, 55 Am. St. 717, 34 L. R. A. 94; *Seim v. State*, 55 Md. 566, 39 Am. Rep. 419; *Tennessee Club v. Dwyer*, 11 Lea (Tenn.) 452, 47 Am. Rep. 298; *Barden v. Montana Club*, 10 Mont. 330, 25 Pac. 1042, 24 Am. St. 27, 11 L. R. A. 593; *Graff v. Evans*, L. R. 8 Q. B. D. 373.

F. D. Allen, Harry A. Rhodes, and S. H. Wentworth, for respondent, cited: *Martin v. State*, 59 Ala. 34; *Manassas Club v. Mobile*, 121 Ala. 561, 25 South. 628; *Army and Navy Club v. District of Columbia*, 8 D. C. App. 544; *Mohrmann v. State*, 105 Ga. 709, 32 S. E. 143, 70 Am. St. 74, 43 L. R. A. 398; *South Shore Country Club v. People*, 228 Ill. 75, 81 N. E. 805, 119 Am. St. 417, 12 L. R. A. (N. S.) 519; *Kentucky Club v. Louisville*, 92 Ky. 309, 17 S. W. 743; *State v. Boston Club*, 45 La. Ann. 585, 12 South. 895, 20 L. R. A. 185; *Chesapeake Club v. State*, 63 Md. 446; *State v. Easton Social L. & M. Club*, 73 Md. 97, 20 Atl. 783, 10 L. R. A. 64, overruling *Seim v. State* on this question; *People v. Soule*, 74 Mich. 250, 41 N. W. 908, 2 L. R. A. 494; *State v. Essex Club*, 53 N. J. L. 99, 20 Atl. 769; *State v. Lockyear*, 95 N. C. 633, 59 Am. Rep. 287; *State v. Neis*, 108 N. C. 787, 13 S. E. 225, 12 L. R. A. 412; *University Club v. Ratterman*, 2 Ohio C. D. 11, 3 Ohio C. C. 18; *Hermitage Club v. Shelton*, 104 Tenn. 101, 56 S. W. 838; *United States v. Alexis Club*, 98 Fed. 725.

DUNBAR, J.—Defendant was adjudged guilty of a violation of an ordinance of the city of Spokane forbidding the sale of intoxicating liquors in such city without procuring a license therefor, and appeals from a judgment and fine entered thereon.

His liability is based upon the fact that he is steward of

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the Spokane Club, a corporation that is alleged to have sold intoxicating liquors in violation of the ordinance in question. The case was heard upon stipulated facts. The appellant presents a condensed statement, which is agreed to by the respondent, and the substance of which is that, in 1890, a number of business and professional men of Spokane formed a voluntary organization under the name of the Spokane Club, the purpose of which was to acquire property and conduct a social club for the accommodation and entertainment of the members of the association. A building was leased and fitted up with dining rooms, sleeping rooms, and rooms where the members met for social enjoyment and entertainment. In 1899 the society was incorporated. It has a resident membership of three hundred, the full number permitted by its by-laws, and a considerable nonresident membership. It has leased a building in which it maintains, for the use of its members and their guests, parlors, bedrooms, reading rooms, writing rooms, billiard rooms, and dining rooms. The monthly expense of the club amounts to \$1,500, and such expense is met by the initiation fee charged new members, annual dues, and the charges made against members for the various accommodations, such as meals, cigars, liquors, the use of the billiard tables, bedrooms, etc., furnished them. The affairs of the club are not conducted on a profit-making basis, the charges made for accommodations furnished being intended only to cover the actual expense thereof.

Among other accommodations furnished by the Spokane Club for the use of its members and their guests, both during the life of the voluntary association and after the corporation succeeded to its rights, it has maintained a room in the club quarters, with one of the regular club employees in charge, where cigars, liquors, wines, beers and mineral waters are furnished, at charges from time to time fixed by the board of managers of the club. No money is received by the attendant for goods so furnished, but slips are signed

by the member, showing the character of the goods furnished and the cost thereof. These slips are turned in by the attendant to the bookkeeper of the club, and are charged to the account of the member, and in due course are paid by him. No member of the club can take a resident of the city of Spokane as his guest into the club rooms. The wines and liquors furnished by the club are purchased by it in quantities at wholesale, and the liquor is furnished to the club members and their nonresident guests in the quantities and at the prices usually charged by retail liquor dealers to their customers. At the price paid for the liquor and at the price for which it is sold, a profit on the liquor would result to the club; but since there should be charged against such profit its proportion of the fixed charges of the club, such as light, heat, rental, salaries of attendants, etc., there is no method of determining what proportion should be charged against it, and it is impossible to determine whether or not any profit is made on the liquor so furnished. In the year 1890, when the voluntary association was formed, there was in effect in the city of Spokane the following ordinance:

“An Ordinance in relation to licenses for selling intoxicating liquors at retail.

“The City of Spokane does ordain as follows:

“Section 1. If any person shall, within the limits of the City of Spokane Falls, sell, dispose of, or for the purpose of evading the provisions of this ordinance give away any spirituous, malt or fermented liquors, wine or beer in any quantity less than one gallon, without first obtaining a license therefor, every such person shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall, for each and every such offense, be fined in any sum not less than twenty nor more than fifty dollars, with the costs of prosecution added thereto.

“Section 2. Any person desiring to keep a drinking shop, bar room or saloon within the corporate limits of the city of Spokane, at which spirituous, malt, and fermented liquors and wines may be sold in less quantities than one gallon, may apply by petition in writing to the city council at any ses-

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sion thereof, which petition must state definitely the building or place where such drinking shop, bar room or saloon is to be kept; and the city council, upon satisfactory proof as to the character of the applicant, may grant to such person a license to be called a retail license, which shall be a sufficient permit to sell liquor at the place so named, not for any other place: *Provided*, That any license that may have heretofore been granted, or that may hereafter be granted, may be transferred with the consent of the city council. No such license shall be granted until such person shall pay the city treasurer the sum of \$1,000 for one year's license, and that no license shall be granted for a shorter period than one year, nor shall such license be granted until such person shall have executed a good and sufficient bond, with two or more sureties, to be approved by the mayor, in the sum of one thousand dollars, conditioned that such person shall keep an orderly house, comply with all the requirements of the charter of the city of Spokane, and of the ordinances of said city and the laws of the state of Washington. As amended Sept. 10th, 1907, by Ordinance No. A2999.

"Section 3. Nothing in this ordinance shall be so construed as to restrict the sale by apothecaries or druggists of spirituous, malt or fermented liquors or wines, for medicinal purposes only, upon the prescription of a practicing physician, and no license shall be required therefor.

"Section 4. No license for the sale of intoxicating liquors shall hereafter be granted without the consent, in writing, of the owner or lessor of the building or premises in which the business is to be conducted; and the paper containing such consent shall be kept on file by the officer issuing such license. And all licenses granted under the provisions of this ordinance shall be issued by the city clerk, signed by him in his official capacity, with the seal of the city affixed.

"Section 5. [As amended June 1, 1887, by Ordinance No. 54.] This ordinance shall not be construed or held so as to render invalid any license heretofore issued by any competent authority and yet unexpired.

"Section 6. This ordinance shall take effect and be in force from the time of its passage and publication.

"Passed the City Council February 24, 1886." Ordinance, Spokane, No. 19."

It is conceded that, since the formation of the club, the city has never before demanded the enforcement of the ordinance above quoted as applied to the club. We might say here that the manner of the payment for these liquors by slips is not material to the case, as it is in effect the payment of money for the liquors furnished. In short, it appears that the club under consideration is the ordinary social club common in the cities of the present day, and the sole question presented is, Is the disposition of liquors by this club to its members, in the manner as stated, the selling or disposing of liquors within the meaning of the ordinance quoted? If it is it is conceded by the appellant that the judgment should be affirmed. Upon this question there is a wilderness of conflicting authorities, and argument has been exhausted. But, after an examination of all the authorities available, a review of any great portion of which could not be encompassed within an opinion of reasonable length, we are constrained to adopt the view of a large majority of the cases decided, and hold that the transaction stipulated constitutes a sale within the meaning of the ordinance.

A sale has been defined by Kent as an agreement by which one of two contracting parties, called the seller, gives a thing and passes the title, in exchange for a certain price in current money, to the other party, who is called the buyer or purchaser, who on his part agrees to pay such price. It is defined in a more condensed statement by Blackstone as a transmutation of property from one man to another in consideration of some price or recompense in value. These definitions have been received by the courts, and many other definitions have been given of the word "sale," but the essential idea in all of them is that of an agreement or meeting of minds by which a title passes from one and vests in another. When the liquor is bought through the regularly constituted agent of the corporation, it undoubtedly belongs to the corporation, the title as well as the possession being in the corporation, and it remains there until it is transferred

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to the buyer for a consideration. Then it becomes the property of the purchaser, and is at his absolute disposal. He can drink it himself, give it to his guest, or throw it away; the corporation has no further interest in it. In other words, it has been paid for, and the transaction, it seems to us, involves all the elements of a sale. The fact that the disposition of the article can only be made to a member of the corporation does not change the character of the transaction; it simply limits the number of transactions. Nor does the fact that the member of the club to whom the sale is made has an interest in the property affect the case. Stockholders in mercantile corporations have the same general interest; but if they were guilty of surreptitiously appropriating the goods of the concern to their own use, the plea of such interest or ownership would not avail them in a prosecution for larceny, even in a business where the stockholders were allowed to purchase the goods of the concern at cost. So that the question of profit is not material.

It is conceded by the appellant that, in a certain sense, a sale is involved in the transaction which is the basis of the complaint in the action, but it is contended that it is not a sale within the meaning of the law. But as we have seen that the word "sale" has a well defined and well understood legal significance, when it is used in statutes, it must be presumed to have been used with respect to such legal definition; otherwise the wildest confusion would be injected into the law, and the courts would find themselves without compass or guide in the construction of statutes. But ordinarily, so far as this particular word is concerned, the legal definition and popular conception are the same, for a man when he buys anything and pays for it and takes it into his possession knows that a sale has been made.

A plausible argument has been presented by learned counsel for appellant to the effect that in states where prohibitory laws exist and the object of the law is prohibition, trans-

actions of this kind ought to be suppressed as being opposed to the spirit of the law; but that a different construction should be placed upon ordinances where the object sought was revenue only. But the weakness of the argument is in the assumption that revenue is the only object of the law. On the contrary, regulation is the principal object of the law's solicitude. These laws are sustained on the theory of police regulation, and if the regulation which the appellant objects to so seriously, viz., the furnishing proof of character and giving a bond to keep an orderly house and to comply with the requirements of the ordinances, could not be enforced, the city would find itself deprived of the right to regulate the sale of spirituous liquors within its precincts; and it cannot be conclusively presumed that the sale of intoxicating liquors by a social club will not, or may not, need regulation.

Besides, under the plain provisions of the ordinance in question, it was the evident intention to regulate the sale of liquors. The language is sweeping, viz: "If any person shall, within the limits of the city of Spokane Falls, sell, dispose of," etc. It is conceded by counsel for the appellant that the language is comprehensive enough in the first section to embrace the business of his clients, but it is claimed that such language is modified and interpreted by § 2, which indicates that the object of the council in passing the ordinance was to regulate barrooms or saloons where spirituous, malt, and fermented liquors and wines are sold. But the facts stipulated show that the appellant in this action was conducting a barroom, it appearing that the club maintained a room in which liquors were kept with the intent to furnish them to members to be drunk on the premises, and this is the ordinary conception of a barroom. In addition to this, the language of the ordinance is sweeping and the only exception that is made is the exception of a drug store, where liquor is sold for medicinal purposes upon the prescription of a practicing physician. Under such circumstan-

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ces the ordinance prescribes that no license shall be required. The requirements of the act being unlimited except as prescribed by the act itself in relation to drugs, we do not feel at liberty to restrict the operation of the act in what seems to us to be its plain intent, viz., to regulate the selling of intoxicating liquors at retail.

Under all the circumstances, we conclude that the ordinance applies to the business carried on by the appellant in this action, and the judgment will therefore be affirmed.

RUDKIN, C. J., PARKER, and CROW, JJ., concur.

[No. 8105. Department One. July 30, 1909.]

E. A. SNOWDELL, *Respondent*, v. SEATTLE ELECTRIC
COMPANY, *Appellant*.¹

STREET RAILWAYS—COLLISION WITH WAGON—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. In an action for injuries sustained by the driver of an express wagon in a collision with a street car in the business district of a large city, the plaintiff is not guilty of contributory negligence, as a matter of law, in assuming that he can cross the street car tracks in safety, where it appears that before crossing he looked back and saw the street car half a block away, approaching on an up grade, at ordinary speed, and the fender of the car struck one of the rear wheels of the wagon, the motorman not having slackened the speed of the car.

Appeal from a judgment of the superior court for King county, Griffin, J., entered November 11, 1908, upon the verdict of a jury rendered in favor of the plaintiff, for injuries sustained in the collision of an express wagon and a street car. Affirmed.

James B. Howe and *H. S. Elliott*, for appellant.

James Kiefer, for respondent.

MORRIS, J.—On July 14, 1908, respondent was injured in a collision between an express wagon driven by him, and a

¹Reported in 103 Pac. 3.

car of the appellant, at the intersection of University street and First avenue, in the city of Seattle. Action was commenced, resulting in a verdict for respondent; and appellant, alleging error in the refusal of the court to grant a nonsuit, in refusing its motion for an instructed verdict, and for judgment notwithstanding verdict, brings the case here on appeal. These claims of error all raise the same question, being based upon the theory that the evidence established contributory negligence. They will, therefore, be discussed together.

The accident happened at about half past five in the afternoon. Respondent was driving west on University street, and upon reaching First avenue, looked both ways for an approaching car, and says he saw a car on the north-bound track about half a block away, coming, as he judged, at ordinary speed, and thinking he had ample time to make the crossing, he drove onto the track. Other witnesses describe how the fender of the car caught a hind wheel of the wagon, tipping it, and throwing respondent to the ground.

Appellant contends his respective motions should have been granted upon the authority of *Criss v. Seattle Elec. Co.*, 38 Wash. 320, 80 Pac. 525; *Coats v. Seattle Elec. Co.*, 39 Wash. 386, 81 Pac. 830, and *Davis v. Coeur d'Alene & Spokane R. Co.*, 47 Wash. 301, 91 Pac. 830. We adhere to the rule announced in those cases, but the facts upon which it was predicated differ from the facts in this case. In the *Criss* case the plaintiff attempted to cross in front of a rapidly moving car. He knew it was coming down grade; he could see it a block or more away, but paid no attention to it, and did not look from the time he first saw it. He had every opportunity to see the car in the dark because of its lights, but the motorman could not see him until he came within the rays of the headlight, when it appears he applied his emergency brake and made every effort to stop the car, but was unable to do so. In the *Coats* case an expressman, driving east on Yesler avenue, Seattle, saw a car approaching him from the

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east. In order to avoid it, he drove upon the east-bound track. Before doing so, he looked back and saw a car approaching on the east-bound track, about fifty yards away, and west of Twentieth avenue. The night was dark, and thinking the car would stop at Twentieth avenue, he drove on the east-bound track without again paying any attention to the car, which did not stop at Twentieth avenue; and before the motorman could bring the car to a stop after seeing Coats, the collision occurred. In the *Davis* case the collision occurred on the outskirts of Spokane between a train of the defendant's electric railway and Davis. The latter saw the train a block away approaching at a speed of from eight to twelve miles an hour, but, without paying any attention to the train, he drove upon the track and was injured.

In the present case, the evidence all shows the car was moving at the ordinary rate of speed on an up-grade. The place where the accident occurred is in the heart of the business district of Seattle, where there is a large street traffic. A witness who was upon the car says he saw the wagon upon the track, "and the car kept on going and I says to myself, 'that fellow is going to get hit,' and the motorman didn't seem to check him as he should have—didn't check the car as he should have." Other witnesses say, from the time they first saw the car there was no slackening in its speed.

This evidence raised a plain question of fact for the jury, upon the respective contentions of negligence, which were submitted to the jury under proper instructions. We cannot say as a matter of law, as contended for by appellant, that a person approaching a street railway crossing on a busy street in a populous city, seeing a car approaching on an up-grade at the ordinary rate of speed, half a block away, is guilty of contributory negligence to such an extent as to bar his recovery, in assuming he can make the crossing in safety. Whether such was the act of an ordinarily prudent man under like circumstances was for the jury, and their

findings upon that question will not, under circumstances such as these, be disturbed.

The judgment is affirmed.

RUDKIN, C. J., CHADWICK, FULLERTON, and GOSE, JJ.,
concur.

[No. 7710. Decided July 30, 1909.]

O. P. HOLLETT *et al.*, *Respondents*, v. SAMUEL T. DAVIS,
Appellant.¹

WATERS AND WATER COURSES—SPRINGS—RIPARIAN RIGHTS—STATUTES—CONSTRUCTION. Bal. Code, § 4114, giving the owner of land the use of waters from springs thereon, provided he can use them on his own premises, has no application to springs having sufficient flow to form water courses, and the common law rule governs riparian rights on such a water course.

SAME—RIGHTS BY PRESCRIPTION—USE FOR STATUTORY PERIOD. A prescriptive right to the use of water for irrigation purposes, diverted from its natural channel by an upper proprietor, is not acquired by a lower proprietor, where he and his predecessors in interest used the water for domestic and culinary purposes for five years, then for two years used it for watering stock, and then for eight years constantly used the water for the purposes of irrigation.

SAME—DIVERTED WATERS—RIGHT TO RE-DIVERT—ESTOPPEL. An upper proprietor, by the diversion of a natural water course into another channel or creek for the period of thirty years, is estopped from preventing the flow of the waters in its new course, where it appears that during such time lower proprietors had acquired title and made valuable improvements bordering upon the creek relying on the flow of water for irrigation, and that without such irrigation their lands would be valueless, although their use had not been for the statutory prescriptive period.

SAME—IRRIGATION—DIVERSION OF WATERS. In an action to prevent the diversion of waters used for irrigation, the court cannot make a division of the waters between the upper and lower proprietors where there is no evidence as to the proportion to which each was entitled.

¹Reported in 103 Pac. 423.

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Appeal from a judgment of the superior court for Klickitat county, McCredie, J., entered February 25, 1908, upon findings in favor of the plaintiffs, restraining the diversion, and apportioning waters used for irrigation, after a trial on the merits before the court without a jury. Modified.

W. B. Presby, for appellant.

E. C. Ward and *N. L. Ward*, for respondents.

FULLERTON, J.—In 1873 the predecessors in interest of the appellant settled upon, and thereafter acquired from the government, the north half of the southeast quarter of section one, in township four, north, of range fourteen, east of the Willamette Meridian. Near the south side of the tract, about midway between its east and west ends, is a large perpetual spring, the stream from which originally flowed southerly in a natural channel across the south half of the southeast quarter of section one, and across the east half of section twelve, in the same township and range, into a water course called Mill creek. The water from the spring formed a natural water course, flowing at all seasons of the year a considerable body of water. To the west of the spring, and separated therefrom by a slight ridge, was a natural channel through which water flowed during the wet season of the year, called Gilmore creek. This creek had its source to the north of the appellant's land and ran in a southwesterly direction across his land in section one, and through the west half of the northwest quarter, and the north half of the southwest quarter, of section twelve, above mentioned. Immediately south of the spring on the land in section one was a marsh, to drain which the original locator cut a ditch from a point a short distance below the spring across the ridge into Gilmore creek, and turned the water from the spring into that creek. This left dry a tract of meadow land containing eight or ten acres in section twelve; and to irrigate this tract a new ditch was cut from Gilmore creek commencing at a point about

one-fourth of a mile below the mouth of the first ditch mentioned and running in a southerly direction to the meadow. Water taken through this ditch was used intermittently for a number of years to irrigate small parts of this meadow, and water was taken from the first ditch for domestic use and to irrigate a tract of about five acres lying south of the spring, but with these exceptions all of the water from the spring was suffered to flow down Gilmore creek from 1873, until it was finally diverted in 1905 and 1906 as hereinafter stated.

In 1889 or 1890, one of the predecessors in interest of respondents settled upon the west half of the southwest quarter and the north half of the southwest quarter of section twelve. The locator of the land lived thereon for about five years, during which time he acquired title thereto from the government. The only water on the premises was that flowing in Gilmore creek, and he made use thereof during his residence on the land for domestic and culinary purposes. In 1894 he sold to the immediate predecessor of the respondents. This person did not live on the land during the two years he owned it, but made use of the water in the creek for domestic purposes and for the purposes of watering stock, hauling it from the creek to his residence. The respondents acquired the property in 1896. In that year they erected a house and barn on the premises and moved thereon with their family, where they have resided continuously until the present time. During their occupancy they have constantly used the water flowing down the creek for domestic purposes and for the purpose of irrigating an orchard and garden during the irrigating season of the year. There is no water on the premises during the dry season of the year, either for domestic use or with which to irrigate, other than that flowing in Gilmore creek from the spring arising on the appellant's premises, and without irrigation neither fruit nor vegetables can be grown thereon.

In 1904 the appellant built a dam across the original channel of the creek, above the meadow on section twelve, intend-

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ing to make a storage basin for the storage of water for use in irrigating on a more extensive scale than he had been wont to do theretofore; and in that year and the two years following, turned the water of the spring therein for a period during the dry season of the year, preventing any flow of the waters down Gilmore creek to the respondents' land.

This action was brought by the respondents to enjoin this diversion. They contended, and the court below decided, that the appellant, by diverting the water for so long a time from its natural channel into Gilmore creek made Gilmore creek the natural channel of the stream from the spring, and estopped the appellant from returning it to its natural channel after the respondents had began putting it to a beneficial use. A judgment was entered in that court requiring the appellant to permit forty per cent of the water of the spring to flow down Gilmore creek during the irrigating season of the year and one-half thereof during the remaining time. This appeal is from the judgment so entered.

The appellant first contends that the court erred in holding that Gilmore creek had become the natural channel of the creek flowing from the spring, and that the respondents had acquired the rights of riparian proprietors thereon, calling special attention to the statute (Bal. Code, § 4114; P. C. § 5829), which gives to the owner of the land upon which a spring arises the use of the waters flowing therefrom, provided such owner can use the water upon his own premises.

With regard to the statute, we are of the opinion that it has no application to a spring having a sufficient flow of water to form a water course. Such a stream is as inseparably annexed to the soil as is any other, and in consequence, riparian proprietors thereon have the right to insist that the stream be permitted to flow as it is wont to flow by nature, without material diminution or alteration, save where the right to divert is acquired by grant, prescription or prior appropriation. In other words, water flowing in a natural water course which arises from a spring is not different, with respect to

the rights of riparian proprietors along the stream, from water flowing through such a course arising from any other source. What might be the rights of parties with respect to springs which do not create a water course, we are not called upon here to decide, and do not decide, but with streams of the character here in question we hold that the common law rule relating to riparian proprietors applies.

It becomes therefore material to inquire what rights the respondents have to the stream in question considered as riparian proprietors. It is said by the appellant that, since the channel in which the spring now flows is artificial with respect to the waters of the spring, the respondents must base their denial of the right of the appellant to return it to its original channel upon one or both of two grounds; namely, that they have acquired a right by prescription to have the water flow through this channel, or that the appellant is now estopped to assert the right to return the water to its natural channel, and he argues that respondents have no right by prescription and are in no position to urge an estoppel against him.

In regard to these contentions, we agree with the appellant that the respondents have no right by prescription based on their own use of the water, as it is clear there has been no such continuous use for the statutory period as would ripen into such a right; but we think they can successfully urge an estoppel. The appellant and his predecessors in interest have made this the channel for the overflow of the spring for more than thirty years, and the respondents, relying on its continued flow therein, have acquired the land bordering on the stream and made valuable improvements thereon which will become valueless if the water is now returned to its original channel. Equity and good conscience, therefore, require that the artificial channel be regarded as the natural channel, and the plaintiff should not be permitted to assert the contrary for his own benefit and the respondents' injury. The rule governing such cases is well stated by this court in the case of

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Matheson v. Ward, 24 Wash. 407, 64 Pac. 520, 85 Am. St. 955. In that case it was made to appear that the Dungeness river, some four miles south of its mouth, originally divided into three channels, the east channel, known as "Hurd's creek channel," the center or main channel, known as the "East channel," and the one further west, known as the "West channel." That some time prior to the year 1865, some person built a wing dam across the west channel, which had the effect of diverting all of the water of the stream into the east channel and Hurd's creek channel. In 1895, after the water had been confined to the east and Hurd's channels for nearly thirty years, certain persons living along these channels again opened up the west channel and dammed the others so as to divert almost the entire flow of the river into the west channel. In 1900 owners of land along the west channel attempted to again confine the waters to the east and Hurd's channels, when the persons who had diverted it in 1895 brought an action to restrain them from so doing. The trial court denied the injunction, and its judgment was affirmed in this court. In the course of the opinion we said:

"Much evidence is quoted by appellants in their brief to the effect that many years ago there was a natural channel in the west, and that one Le Balister, in 1865, closed up this channel by a dam, and that thereafter it filled up by sediment and brush, and no water ran through it at low and ordinary high water. Conceding this to be true, viz., that prior to 1865 it was a natural channel, although the evidence is conflicting upon this point, the admissions already stated make the determination of the question one of law for the court, rather than one of fact. Even if the west channel was a natural channel, prior to 1865 and was then dammed up, and the water diverted to the east and Hurd's creek channels, where it was confined for thirty years, and this flow was acquiesced in by the riparian owners and others along the channels of said river, this would make the east and Hurd's creek the natural channels and defendants and others purchasing and improving lands along the old channel, and relying upon the flow continuing in the channels thereby formed, could not

now have their lands damaged by reason of the water being turned back by artificial means after that lapse of time. After the lapse of thirty years the channels known as the 'east and Hurd's creek' became natural channels, and the attempt of riparian or other owners to change the flow at this late day to the injury of persons on the old channel would be unlawful. According to the evidence it is probably true that in the year 1865 one Le Balister, by means of a dam or embankment, changed the flow of water out of the west channel. Conceding it to be so, the acquiescence by plaintiffs and their grantors and all riparian owners below the point of divergence for a period of thirty years has now lost them the right to change the flow from the new into the old channel."

To the same effect is *Shepardson v. Perkins*, 58 N. H. 354, where the court used the following language:

"If the landowner, having changed the direction of the natural stream through his land, were to suffer others who are entitled to use the water to expend money in reference to such use, under a belief that the new channel was to be permanent, and this were known to him, he could not afterwards change its course so as to injure the party who had expended his money. In these and like cases, whenever one who owns a watercourse in which another is interested, or by the use of which another is affected, does any act, or suffers any act to be done, affecting the rights of other proprietors, whereby a state of things is created which he cannot change without materially injuring another who has been led to act by what he himself had done or permitted, the court applies the doctrine of equitable estoppel."

And Mr. Gould says:

"When a riparian owner has diverted the water into an artificial channel, and continued such change for more than twenty years, he cannot restore it to its natural channel to the injury of other proprietors along such channel who have erected works or cultivated their lands with reference to the changed condition of the stream," Gould, *Waters* (3d ed.), § 225.

These authorities maintain the principle that the proprietor of a stream, by diverting it into an artificial channel,

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and suffering it to remain in its changed condition for a period of time exceeding the statute of limitations, is estopped, as against a person making a beneficial use of the water, from returning it to its natural channel to that person's loss and injury; that the user does not have to show a prescriptive right in himself, or a use by himself for the period of the statute of limitations in order to prevent its return; all he needs to show is that the person diverting it has suffered it to remain in its changed state for that period and that he has made a beneficial use of the water relying upon the permanency of the change.

The court in its decree directed that the water flowing from the spring be divided so that forty per centum thereof should be permitted to flow down Gilmore creek during the irrigating season of the year, and one-half thereof during other seasons. We are unable to find any basis in the record for this division of the water. While it appears that the appellant and his predecessors in interest had irrigated a five-acre tract lying immediately below the spring for a period of ten years and more and three acres of it practically for twenty-five years, and had irrigated parts of the meadow in section twelve intermittently for nearly as long, the record is silent as to the quantity of water thus required, or as to what part of the total flow was actually used. So, also, it is silent as to the proportion of the water flowing from the spring that was permitted to flow down Gilmore creek, or what proportion of that which was thus permitted to flow the respondents actually used or required for irrigation and domestic uses. No just division of the water can be made without knowledge of these matters, and hence, we cannot in this court direct a final decree in the case, nor can we affirm the justness of the decree entered.

The decree appealed from will be reversed, and the case remanded with instructions to receive such further evidence as the parties may desire to offer on the line above indicated

as will enable the court to make a just division of the water between them, and thereafter to enter a decree accordingly.

RUDKIN, C. J., CHADWICK, GOSE, DUNBAR, and CROW, JJ.,
concur.

[No. 7824. Decided July 30, 1909.]

A. F. BLAIR *et al.*, *Respondents*, v. WILKESON COAL & COKE
COMPANY, *Appellant*.¹

PLEADING—VARIANCE—WAIVER OF OBJECTION. In an action to recover for services rendered, the defendant cannot claim a variance in that the complaint was for the breach of an express contract, while the case made was on *quantum meruit* for services rendered, where it appears that the complaint was susceptible of two constructions, covering either phase of the case, and the defendant had not moved that it be made more definite and certain or required that plaintiffs make an election before the trial.

CONTRACTS—PERFORMANCE—EXCUSE FOR NONPERFORMANCE. In an action on an express contract for services, failure of the plaintiffs to perform their part is excused by acts of the defendant preventing performance.

SAME—PREVENTING PERFORMANCE—DEMAND—NECESSITY. In an action for a balance due upon contract, an express demand that plaintiffs be allowed to complete performance on their part is not necessary when defendant ordered plaintiffs to quit work and refused further payments.

APPEAL—REVIEW—FINDINGS. In an action tried before the court without a jury, insufficiency of the findings is immaterial where the evidence justifies the judgment.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered October 16, 1908, upon findings in favor of the plaintiffs, after a trial before the court without a jury, in an action on contract. Affirmed.

Herbert S. Griggs, for appellant.

C. E. Stevens and *W. C. Morrow*, for respondents.

¹Reported in 103 Pac. 18.

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FULLERTON, J.—The respondents brought this action to recover for professional services rendered the appellant. In their complaint they averred the corporate capacity of the appellant, their own copartnership, and continued as follows:

“(3) That on or about the 6th day of February, 1908, plaintiffs and defendant entered into a certain contract for the performance by the plaintiffs of professional work and services in the designing and construction of a coal washing and storage plant for the defendant at its mine in the said town of Wilkeson, Washington, under and by virtue of which contract plaintiffs were to prepare and furnish plans, drawings, specifications, bills of material and to secure bids on material and machinery for the said coal washing and storage plant and to provide and furnish the general engineering superintendence necessary to the construction of such plant.

“(4) That defendant agreed to pay as consideration for such services by plaintiff an amount equal to five per cent (5%) of the total cost of said work, in the following manner, to wit: Three hundred (\$300) dollars on the date of said agreement and thereafter a payment of three hundred (\$300) dollars on the first of each and every succeeding month for three months until the total sum of twelve hundred (\$1200) dollars should have been paid. The balance of said consideration of five per cent (5%) of the total cost of said work, less said sum of twelve hundred (\$1200) dollars to be paid upon completion of said work. It was further agreed that in the event of the postponement or abandonment of said work at the instance of defendant, the plaintiffs should receive as compensation for their services five (5%) of the total estimated cost of said work.

“(5) That thereafter pursuant to said agreement and understanding and at the special instance and request of defendant, plaintiffs proceeded with said engineering work and prepared preliminary sketches, working drawings, specifications, bills of material, detail drawings, procured bids on material and machinery, made and prepared permanent plans and tracings and did generally all such engineering work as was proper and necessary preparatory to the construction of said coal washing and storage plant.

“(6) That thereafter on or about March 1st, 1908, de-

fendant notified plaintiffs to discontinue work and has ever since refused to allow plaintiffs to proceed with the same.

"(7) That the estimated total cost of said coal washing and storage plant amounts to the sum of forty-seven thousand and two hundred fifty (\$47,250) dollars; that plaintiffs' compensation for said services rendered, based on the said rate of five per cent (5%) of said total estimated cost amounts to the sum of twenty-three hundred sixty-two and 50-100 (\$2,362.50) dollars, which said sum is the reasonable and fair value of said services; that no part of said sum has been paid, except the sum of three hundred (\$300) paid at the date of said agreement and the further sum of three hundred (\$300) paid on or about March 2nd, 1908, leaving a balance due plaintiffs of seventeen hundred sixty-two and 50-100 (\$1762.50) dollars, demand for which has been made and refused."

Issue was taken on the allegations of the complaint and a trial had before the court sitting without a jury. The evidence tended to show, and the court found in substance, that the appellant is a corporation, owning and operating extensive coal mines and works, situated at Wilkeson, in this state. That the respondents are mechanical engineers, practicing their profession in the city of Tacoma. That sometime in the early part of the year 1908, the appellant, acting through its general manager, employed the respondents to prepare plans and specifications for a coal washing plant to be constructed near its mine. A general description of the character of plant wanted was given the respondents by the manager, and therefrom they prepared a small scale plan which was submitted to the manager. The first one submitted did not suit, and a second one was prepared and handed him. This one was approved, after some minor changes, and the respondents were directed to prepare detail plans in accordance therewith. The respondents thereupon enlarged the drawings according to the scale plan submitted, and thereafter submitted them to the manager, together with a form of contract by the terms of which the engineers agreed to furnish preliminary sketches, working drawings, specifications, bills of materials, detail

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drawings, for a coal washing and storage plant at Wilkeson, and to superintend its construction, for a compensation equal to five per centum of the total cost of the work; the compensation to be paid, \$300 on the acceptance of the contract, \$300 on the first of each succeeding month until a total of \$1,200 should be paid, and the balance on the completion of the work. The appellant's manager did not sign the contract, giving as his reason that before signing it he desired to go over its details with his superintendent. He approved the contract, however, both with respect to the compensation and plans (except certain minor details regarding machinery) and directed them to continue with the work. The next day he called and paid \$300, and requested that a floor plan be immediately prepared. Such plan was prepared at once, and during the month following numerous conferences were held with him by respondents, at which time all the designing and engineering work was done, detail plans and specifications were drawn, and bids for the construction work called for; there remaining of the work included in the contract of employment only a few minor tracings, and the superintendence of the construction work while the building should be in course of construction. At the end of the month the appellant made a second payment of \$300, and at the same time notified the respondents to discontinue work on the plans. It was further shown that the work was not thereafter continued, and that the appellant refused to make any further payments, although the respondents offered to perform and demanded payment for the balance claimed to be due them. Evidence was also introduced showing the reasonable value of the services performed. The trial resulted in findings and a judgment in favor of the respondents for the sum of \$1,262.50, which the court found to be the reasonable value of the services rendered, after deducting the payments made.

The appellant first contends that there is a fatal variance between the pleadings and the proofs. He contends that the

complaint is based on an express contract, and a breach thereof on the part of the appellant, and that the respondents were entitled, because of the breach, to receive the full contract price, while the case was tried on the theory of a *quantum meruit*; that is, that the respondents performed services at the request of the appellant and were entitled to recover the reasonable value of such services. It must be conceded, we think, that the complaint is so worded as to lend color to the claim that it was capable of two constructions; one, that it is an action to recover on an express contract for the performance of certain services, regardless of the value of the services rendered; and the other, that it is an action to recover on a *quantum meruit* for services rendered under a contract after a breach of the contract, the complainant waiving the right to sue in damages for the breach. But since the complaint was thus capable of a double construction, the appellant's remedy was not to claim a variance between the pleadings and proofs. It could, prior to taking issue thereon, have by motion compelled the respondents to make the complaint more definite and certain, or could at any time before entering on the trial have compelled them to elect on which theory of the complaint they would proceed; but by entering on the trial, these objections were waived, and the appellant's sole right thereafter was to combat the case as made by the evidence. It was of no avail, therefore, to claim a variance between the pleadings and proofs. In fact there was no such variance. It was merely a case where the plaintiff had a choice of remedies, and his complaint did not make clear which remedy he had chosen.

It is next claimed that there was a failure of proofs on the part of the respondents. It is said that since they alleged an express contract, it was necessary to prove a complete performance of the contract, or such facts as would justify or excuse their failure to perform the contract in its entirety, and that they failed in their proofs in this respect. Undoubtedly the legal rule is here correctly stated, but we do not

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think the appellant properly interprets the evidence. It seems to us that the respondents did prove a sufficient excuse for failing to complete the work. They performed the contract as far as they could, and were only prevented from performing it in its entirety by the acts of the appellant. This is clearly a sufficient excuse for nonperformance. But it is said there was no express demand that they be allowed to continue in the performance of the work, nor any demand for the balance of the money claimed to be due. As we read the evidence there was both. Demand, however, was hardly necessary. They were expressly ordered to quit work, and were refused further payments. This rendered unnecessary an express demand either to be allowed to continue the work or for payment for that which had been done. The claim was ripe for action the moment they were denied the right to go on with the contract.

Finally, it is urged that the findings of the court are incomplete and inconsistent. While we do not discover this fault in the findings, it would not avail the appellant anything if they were so. The evidence abundantly justifies the judgment entered, and in such a case this court is obligated by the statute to affirm the judgment, no matter how irregular the proceedings may be in the respect complained of. The judgment is right and will stand affirmed.

RUDKIN, C. J., CROW, CHADWICK, GOSE, and DUNBAR, JJ.,
concur.

[No. 7851. Decided July 30, 1909.]

B. E. A. WINDUST, *Appellant*, v. MAUDE SUTTON *et al.*,
Respondents.¹

SPECIFIC PERFORMANCE — CONTRACT — ASSENT — AREA — EVIDENCE.
Where the minds of a vendor and vendee did not meet as to the exact tract of acreage intended to be bought and sold, the vendee cannot sue to recover additional acreage on evidence that would simply have entitled her to a rescission of the contract.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered October 23, 1908, upon findings in favor of the defendants, after a trial before the court without a jury, in an action for the specific performance of a contract to convey land. Affirmed.

Samuel R. Stern, for appellant.

Peacock & Ludden, for respondents.

FULLERTON, J.—In 1895, the respondent, Maude Sutton, entered into a contract with the Northern Pacific Railway Company, by which she agreed to purchase from the railroad company, and the company agreed to sell to her, lots 2 and 3, in township 26, north, of range 45, east of the Willamette Meridian, at the agreed price of \$80.25 for lot 2, and \$80.10 for lot 3, to be paid in five equal annual installments, with interest on the deferred payments. Lot 2 contained 32.10 acres, and lot 3, 53.40 acres, according to the government surveys. Some two years after the contract had been entered into, the appellant applied to the respondent to purchase an interest in the land. The parties subsequently entered into an oral contract by the terms of which the respondent contracted to sell the appellant some part of the land covered by the two descriptions, but as to what part the parties do not agree; and the controversy between them on this point forms the subject-matter of this action.

¹Reported in 103 Pac. 10.

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The appellant contends that for half of the purchase price she was to have lot 2 and a sufficient acreage of lot 3 to make one-half of the entire area, while the respondent contends that the appellant was to have lot 2 at the price the respondent had agreed to pay the railroad company for the same, with the modification, that, if the line between the lots when surveyed and marked on the ground should leave no access to lot 3, without passing over a part of lot 2, she was to have such portion of the lot as would be necessary for access, she to convey to the respondent an equal area on the lake frontage in the northeast corner of lot 3. Subsequent surveys showed no necessity for using any portion of lot 2 as a right of way to lot 3, and the respondent subsequently deeded to the appellant the whole of that lot. This action was thereafter begun by the appellant to compel the conveyance of a sufficient quantity of land out of lot 3 to make the two tracts equal in area. The trial court ruled with the respondent and this appeal was taken therefrom.

On the question of fact presented by the record, we think it clear that the respondent, at the time she entered into the contract with the appellant, understood that she was agreeing to convey to the appellant lot 2, with the qualification above mentioned, for the price she had agreed to pay the railroad company for that lot. The dividing line between lots 2 and 3 had not then been projected on the ground, and neither the appellant nor the respondent knew where it would run when actually marked out. Both of them seem to have thought that the dividing line was farther south than it actually proved to be, but the respondent thought the line when surveyed would mark the boundary between the two lots, unless, as she explains, it should cut off her right of access to the tract she retained. On the other hand, we think it equally clear that the appellant understood that she was to receive one-half of the entire area, and that she accepted the deed to lot 2 as a partial fulfillment of the contract only, intending to insist upon and enforce a conveyance of a part of lot 3 equal

in area to one-half the difference between the two tracts. But, as her proofs fall short of convincing us that the respondent so understood the contract, she has perhaps made a case on which she would have been entitled to a rescission had she made an offer to rescind when she discovered that there had been no meeting of minds, but she has made no case authorizing a recovery of additional acreage.

The evidence is voluminous, and it would serve no useful purpose to enter upon a review of it here. On the record the judgment is right and will stand affirmed.

RUDKIN, C. J., CHADWICK, GOSE, DUNBAR, and CROW, JJ., concur.

[No. 7927. Department Two. August 2, 1909.]

THE STATE OF WASHINGTON, *Respondent*, v.
KNUTE B. AKER, *Appellant*.¹

CRIMINAL LAW—TRIAL—VERDICTS—IMPEACHMENT. A verdict in a criminal case cannot be impeached by the affidavit of a juror showing the effect upon his mind of comment by the judge, but the impropriety of comment must be determined from the context alone.

SAME—MISCONDUCT OF JUDGE. A remark by the trial judge indicating that cross-examination had proceeded far enough, is not objectionable as indicating the judge's opinion as to the guilt of the accused, nor as comment on the evidence.

SAME—MISCONDUCT OF JUROR—NEW TRIAL. It is not misconduct warranting a new trial that a juror expressed his opinion in the jury room as to the guilt of accused before the case was submitted, where it is not claimed that the opinion was based on facts outside the evidence.

SAME—TRIAL—VERDICT—IMPEACHMENT. A verdict cannot be impeached by the affidavits of a juror that he was coerced to agree to the verdict by threats that he would be denounced to the court and, as he believed, subjected to penalties.

SAME—TRIAL—MISCONDUCT OF BAILIFF. It is not misconduct on the part of a bailiff having the jury in charge, warranting a new trial, that he opened the door during the deliberation of the jury

¹Reported in 103 Pac. 420.

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and stood temporarily in the doorway and spoke to the jurors, when nothing is shown as to what he said, this having occurred in the presence of one of the attorneys for the accused.

INCEST—EVIDENCE—CORROBORATION—NECESSITY. A conviction of incest may be had without corroboration of the testimony of the prosecuting witness, in the absence of any statutory requirement therefor.

CRIMINAL LAW—TRIAL—INSTRUCTIONS—LESSER OFFENSES—ATTEMPTS—INCEST AND ASSAULT. In a prosecution for incest it is proper to refuse to instruct that the jury may find the accused guilty of an attempt to commit the crime, or of assault and battery, where any attempt made culminated in the completed offense, and there was no charge of assault and battery, although there was evidence that the offense was committed with some force; since consent is not an element of the offense.

Appeal from a judgment of the superior court for Whatcom county, Kellogg, J., entered August 17, 1908, upon a trial and conviction of incest. Affirmed.

Bugge & Swartz, for appellant.

George Livesey and *J. W. Kindall* (*Virgil Peringer*, of counsel), for respondent.

PARKER, J.—The defendant and appellant was charged with the crime of incest, by information of the prosecuting attorney of Whatcom county, and upon a trial before the court and a jury, was found guilty, upon which judgment was rendered sentencing him to imprisonment in the state penitentiary, from which he appeals to this court. We will notice the facts so far as necessary in connection with our discussion of the several assigned errors.

During the progress of the trial, while the prosecuting witness was being cross-examined, and after she had been compelled to describe in detail the acts of the defendant constituting the crime, one of the jurors asked the court: "Is it necessary to go through these details, your Honor?" to which the court replied, "The court is powerless to rule on testimony that is not objected to, gentlemen. The object of

this trial is for the court and jury to listen to the testimony; the court has no discretion. Proceed with the examination." Thereupon counsel for defendant asked a question of the witness which called for repetition of matters she had already testified to, when the prosecuting attorney objected to further cross-examination along that line, which objection the court sustained, allowing an exception to the defendant. Upon the opening of court the following morning, the jury not being present, counsel for the defendant objected to these remarks of the juror and the court, and objected to further proceeding with the trial with the present jury, which objection the court overruled, allowing an exception. Upon the hearing of a motion for a new trial, for the purpose of showing the prejudicial effect of the question of the juror, and the remarks of the court in reply thereto, the affidavit of a juror was read wherein he stated that he had heard the remarks of the juror and of the court in reply thereto, and that "The manner in which the court replied to the question so impressed the mind of this affiant of the guilt of the defendant that it became a fixed opinion which he found impossible to disregard which remained in affiant's mind throughout the trial and until the rendition of the verdict in said cause."

It is contended that these remarks of the court were such as to convey to the minds of the jury the fact that the court was prejudiced against the defendant; and that he was entitled to a new trial on that account. This contention we think must be determined by the remarks of the juror and the court alone, uninfluenced by the statement of the other juror in his affidavit as to the effect upon him in arriving at the verdict, for the latter inheres in the verdict, and cannot be shown by the affidavit of a juror. As was said by this court in *Marvin v. Yates*, 26 Wash. 50, 66 Pac. 181,

"It is not for a juror to say what effect certain conduct may have had upon the verdict, because of the well known principle that he cannot be heard to impeach the verdict; but

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the court must determine from the facts stated what effect, if any, the alleged misconduct had upon the verdict."

See, also, *State v. Parker*, 25 Wash. 405, 65 Pac. 776; *Ralton v. Sherwood Logging Co.*, ante p. 254, 103 Pac. 28.

We are unable to see anything in the remarks of the judge in reply to the juror's question which indicates his view upon the question of the defendant's guilt or innocence, or upon any fact in issue in the case. The fact that the judge's remarks may have indicated to the minds of the jury that he considered that the cross-examination had proceeded far enough along that line, and the fact that such remarks may have suggested to the prosecuting attorney that he object to such further cross-examination, as is argued by defendant's attorney, is no indication of the judge's view upon the facts in issue, nor that he was prejudiced for or against the defendant. We do not think that these remarks of the court amounted to a comment upon the facts, nor was error committed in sustaining the objection of the prosecuting attorney in view of the extent to which the cross-examination by defendant's attorney had been allowed to proceed.

Upon hearing of the motion for new trial, counsel for defendant sought to show by the affidavit of a juror that, at a recess during the progress of the trial while the prosecuting witness was giving her testimony, the jury was taken to the jury room, and while there a juror expressed in a positive manner his opinion that the defendant was guilty, and other jurors acquiesced in the statement and expressed themselves in substance to the same effect. It is contended that this was such misconduct on the part of the juror as entitled the accused to a new trial. It is not claimed that the expression of opinion was based upon any fact outside the testimony which had been given upon the trial, or that the juror stated any facts relating to the accused, or that the expressions of opinion were made within the hearing of any person other than the jurors themselves. We think this is not such misconduct as can be shown by the affidavit of a juror. It is

clearly distinguishable from the case of *State v. Parker*, *supra*, cited by appellant's attorneys, where the juror stated to his fellow jurors facts within his personal knowledge clearly outside the evidence.

Upon the hearing of the motion for a new trial, coercion in arriving at the verdict was sought to be shown by the affidavit of a juror, wherein the juror stated:

"That prior to said term of court, the affiant informed the prosecuting attorney of said county that the defendant had for a long time done business with affiant at his store, and that before the said term of court affiant and the defendant had casually talked about said case; that affiant was surprised when the county attorney permitted him to remain as one of the jurors to try said cause; that during the course of said trial, in the jury room, other jurors learned from the affiant that he had talked with the defendant about the charge on which he was being tried; that after said cause was submitted to said jury and the jurors had retired to deliberate upon their verdict, the affiant voted on two ballots in favor of acquittal; that thereupon other jurors upon learning that affiant was casting his vote in favor of acquittal, threatened the affiant that unless he ceased to do so, and joined with the other jurors in finding a verdict of guilty as charged, they would denounce him to the court for having consented to serve upon said jury after talking with the defendant about the charge brought against him; that the affiant not being versed in the law and thinking that possibly he had done something he should not have done, and made himself liable to penalties, thereupon voted with the other jurors on the next succeeding ballot."

We think this also relates to facts which cannot be shown by the affidavit of a juror. It is a matter inhering in the verdict, and to receive such statements from a juror is clearly to allow him to impeach his own verdict. 29 Cyc. 984; Thompson, Trials, § 2618.

It was claimed that there was misconduct on the part of the bailiff having the jury in charge during their deliberation such as to entitle the accused to a new trial. The alleged mis-

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conduct was shown by the affidavit of one of the attorneys for the accused, and is as follows:

"Hans Bugge, being first duly sworn, deposes and says: That he is one of the attorneys for the defendant herein; that on the trial of said cause, in the evening after the jury had been sent out to deliberate on their verdict, and while the court was not on the bench, but had retired to his chambers, the bailiff having said jury in charge, without any authority from the court or consent of defendant's counsel, and without the direction of the court or counsel, and without being called by said jury, then and there deliberating as aforesaid, went to the jury room and unlocked and opened the door leading into said jury room and placed his person within the jury room so that only one of said bailiff's legs remained without the door; that affiant heard him speak to the jurors within; that he then withdrew with a pack of playing cards in his hands; that after locking the door to the said jury room and advancing a few steps away therefrom, he returned, reopened the door and placed his body within the jury room as on the previous occasion for a brief moment, then withdrew as before, locking the door and brought said playing cards into the main court room where affiant and others were assembled, and further affiant saith not."

It is not claimed that the bailiff said anything to the jurors relating to the case. The affidavit is silent as to what the bailiff said to the jurors, and is also silent as to whether or not the affiant understood what the bailiff said to the jurors. We are not inclined to sanction any practice which permits the invasion of the privacy of the jury room during deliberation. But we cannot presume that a sworn officer of the court whose duty it is to have charge of the jury has been guilty of misconduct when such alleged misconduct occurred in the presence of the person making affidavit relative thereto, and no more is shown as to such conduct than is stated in this affidavit. We cannot presume that the bailiff stated anything to the jury in connection with the cause when affiant states that he heard him speak to the jury, but does not state what he said or as to whether or not affiant knew what he said.

We do not think that the mere temporary presence of the bailiff in the jury room door under the circumstances here shown is such misconduct as warrants us in holding that the trial court committed error in refusing a new trial on that account. 29 Cyc. 808.

Upon exception to certain instructions given by the court and its refusal to give others requested by defendant's counsel, there is presented the question of the necessity for corroboration of the complaining witness in order to sustain the verdict of the jury finding the defendant guilty. We need not set out at length here the instructions given or the requested instructions refused, since the argument of counsel is addressed only to the question of necessity for corroboration. Assuming, for the sake of argument, that in this cause the testimony of the prosecuting witness as to the acts of the defendant constituting the offense charged was not corroborated, still we think, in the absence of any statutory rule upon the subject, it was not necessary there should be corroborating evidence, under the previous holding of this court. Prior to the act of 1907 (Laws 1907, p. 396), providing that conviction shall not be had for the offense of rape upon the testimony of the injured party unless corroborated, this court had repeatedly held that it was not necessary that there should be corroboration in such cases. *State v. Roller*, 30 Wash. 692, 71 Pac. 718; *State v. Fetterly*, 33 Wash. 599, 74 Pac. 810; *State v. Patchen*, 37 Wash. 24, 79 Pac. 479; *State v. Conlin*, 45 Wash. 478, 88 Pac. 932.

We have no statutory rule as to the necessity for corroboration in order to support a conviction for the offense here charged, and the weight of authority seems to be, in the absence of statutes, that such corroboration is not necessary. 22 Cyc. 57; *Brown v. State*, 42 Fla. 184, 27 South. 869; *State v. De Hart*, 109 La. 570, 33 South. 605; *People v. Jenness*, 5 Mich. 305; *State v. Dana*, 59 Vt. 614, 10 Atl. 727; *Porath v. State*, 90 Wis. 527, 63 N. W. 1061, 48 Am. St. 954; *Whittaker v. Commonwealth*, 95 Ky. 632, 27 S. W. 83.

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We are not able to see any reason for adopting a different rule, in the absence of statute, from that heretofore followed by this court. The testimony of the prosecuting witness was positive and specific as to the acts of the defendant, and the court instructed the jury relative to her testimony, among other things, that if they should

“ . . . find that her credibility has in no manner been successfully impeached, and you believe her testimony, and disbelieve the testimony of the defendant, you have a right to return a verdict of guilty against the defendant even though there has been no corroborative testimony in this case in support of the prosecuting witness as to the particular acts constituting the crime.”

This instruction is in almost the exact language as that given and approved in *State v. Roller, supra*. We think the court was not in error in giving these instructions and refusing the requested instructions which were to the effect that corroboration was necessary in order to sustain a conviction. We find no error in other instructions given by the court nor in the refusal of the court to give other requested instructions. The substance of the requested instructions were given by the court, though in different language in so far as was necessary to the protection of the rights of the accused.

At the close of the court's instructions, and before the jury retired, counsel for the accused requested the court to submit to the jury forms of verdicts covering attempt and also assault and battery to the end that the jury might be permitted to return either of such verdicts. This the court declined to do, and error is assigned. We think the action of the court in this regard was clearly right. There is no evidence whatever in the record which would warrant a finding by the jury of any verdict other than guilty or not guilty. Whatever attempt there was on the part of the defendant culminated in the completed crime, neither is there any charge of assault and battery nor of any crime including assault and battery in the information. The fact that the evidence showed that

the offense was committed with some degree of force, and against the will of the prosecuting witness, if committed at all, does not change the charge so as to warrant a finding as to assault or assault and battery. The guilt or innocence of the accused of the crime here charged, is in no way affected by the consent of the prosecuting witness, or by the means used by the accused in the commission of the offense. *State v. Nugent*, 20 Wash. 522, 56 Pac. 25, 72 Am. St. 133.

Numerous errors are assigned upon the court's rulings incident to the examination of witnesses. We have carefully examined all of the rulings of the court in this regard which are claimed to be erroneous, and find no error therein. They, for the most part, involve only questions of judicial discretion incident to the conduct of the trial, and are not such that we feel called upon to review them here.

Finally, counsel for the accused contend that the evidence was insufficient to justify the verdict of guilty as returned by the jury. Upon this question they argue strenuously and at great length, reviewing the evidence in considerable detail. We do not feel that any useful purpose would be served for us to review and analyze the five hundred and more pages of evidence in this record with a view to justifying our conclusions against the learned counsels' contention. It is enough to say that we have read carefully all of this evidence and are convinced that it is sufficient to sustain the verdict and judgment. As we have said the testimony of the prosecuting witness was positive and specific as to acts of the defendant constituting the offense, and there were also some corroborating circumstances shown, though we have held corroboration was not indispensable to conviction.

We find no reversible error in the record, and are therefore compelled to affirm the judgment. It is so ordered.

RUDKIN, C. J., DUNBAR, CROW, and MOUNT, JJ., concur.

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Opinion Per PARKER, J.

[No. 8086. Department Two. August 2, 1909.]

S. P. MAYNARD *et al.*, *Appellants*, v. JEFFERSON COUNTY,
Respondent.¹

COUNTIES—ACTIONS—CONDITIONS PRECEDENT—REJECTION OF CLAIM—RECORD OF REJECTION—LIMITATION OF ACTIONS. A claim against a county made by C. as attorney for S. P. M. and his wife H. M., for injuries sustained by the wife, filed on a certain date, is sufficiently identified and shown to have been rejected by a record of the county commissioners reciting the filing of a claim on said date by C. as attorney for H. M., referring to the place of the accident and amount of the claim, and stating "claim was rejected"; and an action thereon is barred within three months, under Bal. Code, § 359, although the claim was a community property claim, action upon which would have to be brought by the husband.

Appeal from a judgment of the superior court for Jefferson county, Still, J., entered October 29, 1908, by direction of the court, after a trial before a jury, dismissing an action for personal injuries sustained by a traveler on a county road. Affirmed.

A. R. Coleman, for appellants.

James W. B. Scott, J. M. Ralston, and *U. D. Gnagey*, for respondent.

PARKER, J.—This action was brought to recover damages on account of personal injuries resulting to the plaintiff Henrietta Maynard, alleged to have been caused by the negligence of the defendant in maintaining a defective bridge upon one of its county roads. The cause proceeded to trial before the court and a jury, when, after the plaintiffs had introduced all of their evidence relating to the presentation of their claim to and rejection thereof by the county commissioners, upon motion of defendant's attorneys, the trial court entered its order and judgment dismissing the action upon the ground that the evidence offered by plaintiffs affirmatively showed

¹Reported in 103 Pac. 418.

that they had not commenced their action within three months after the rejection of their claim by the county commissioners, as provided by law. From this order and judgment of dismissal, the plaintiffs have appealed to this court. The undisputed facts appearing from this record, in so far as they are necessary to be noticed in determining the correctness of the trial court's disposition of the cause, are as follows:

On October 7, 1907, the appellants, jointly as husband and wife, presented to the county commissioners of Jefferson county their claim for damages, which was signed by A. R. Coleman, their attorney, and verified by the appellant Henrietta Maynard, which claim set forth the nature and extent of the injuries, and the cause thereof, together with their claim for damages, substantially as in their complaint filed in this action. On the same day the commissioners considered the claim and caused a record of their action thereon to be made in their minutes, in words and figures as follows:

"A. R. Coleman presented a claim to the board as attorney for Mrs. Henrietta Maynard for damages for injuries received on account of alleged defective county bridge on Discovery bay in section 5, township 29 north of range 1 west, in the sum of \$10,000. Claim was rejected."

Neither the claimants nor their attorney were present when this action was taken by the commissioners. The following day one of the commissioners informed Mr. Coleman, the claimant's attorney, that the board had rejected the claim. Mr. Coleman did not see the record of the action of the commissioners until several days thereafter when he examined it in the auditor's office. No further action looking to the bringing of a suit upon the claim against the county was taken until more than three months thereafter, when Mr. Coleman spoke to the chairman of the board of county commissioners, and also to the county attorney, requesting that some action should be taken which would dispose of the claim. Similar requests were made upon other subsequent occasions, when finally, on the 7th day of July, 1908, the following

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record was made by the county commissioners relative to the claim:

"S. P. Maynard and Henrietta Maynard by their attorney, A. R. Coleman, again appeared on behalf of a claim for damages alleged to have been sustained by Henrietta Maynard on or about the 13th day of July, 1907, at or near a county bridge on Discovery bay in section 5, township 29 north of range 1 west, which claim was filed with the county auditor of Jefferson county October 7th, 1907, and asked that action be taken by the board with reference to same. The board, by its chairman, informed Mr. Coleman that the identical claim had been before presented to the board, and was by the board rejected on the 7th day of October, 1907."

A few days thereafter, on July 13, 1908, over nine months after the first action of the commissioners upon the claim had been taken, this suit was commenced. Section 359 of Bal. Code (P. C. § 4113), relating to appeals from boards of county commissioners to the superior court, among other things, provides:

"Nothing herein contained shall be so construed as to prevent a party having a claim against any county in this state from enforcing the collection thereof by civil action in any court of competent jurisdiction, after the same may have been presented and disallowed in whole or in part by the board of county commissioners of the proper county: Provided, That such action be brought within three months after such claim has been acted upon by such board."

It is conceded by learned counsel for appellants that, under the plain provisions of this statute, if the claim of appellants was acted upon, and a proper record of such action made by the board of county commissioners more than three months prior to the commencement of this action, the judgment of the superior court was right. Upon the other hand, if the action of the board was had less than three months before the commencement of this action the judgment of the superior court was wrong. The question then is presented as to whether or not the action of the board on October 7, 1907,

was such a rejection of the claim as would start running the three months' limitation for commencing action thereon. It is earnestly contended by counsel that since the record of the commissioners made October 7, 1907, refers only to a claim presented by A. R. Coleman as attorney for Henrietta Maynard, their action at that time was not a rejection of the claim of S. P. Maynard and Henrietta Maynard which was sued upon in this action, and that the claim sued upon was in no event rejected by the board of county commissioners prior to July 7, 1908, which was only a few days prior to the commencement of this action. And thus it is argued that this action was commenced within the time limited by law.

For the purpose of showing that a claim of this nature is a claim of the community and not of the injured wife, counsel call our attention to *Hawkins v. Front Street Cable R. Co.*, 3 Wash. 592, 28 Pac. 1021, 28 Am. St. 72, 16 L. R. A. 808; *Davis v. Seattle*, 37 Wash. 223, 79 Pac. 784. It is true that under our laws such a claim as is here involved is a claim of the community, and that suit thereon must be brought in the name of the husband and that the wife is not a necessary party to such action, though she is a proper party. But when such a claim is acted upon by the commissioners and record thereof is made in their minutes, we do not think that such record should be subjected to technical rules of construction in determining its meaning. If the record, taken in connection with the matter which was actually before the commissioners, plainly indicates as to what claim their action refers, it will be held sufficient in law, even though the language of the record might lack that technical exactness required in court proceedings. As was said by this court in *State ex rel. Ross v. Headlee*, 22 Wash. 126, 66 Pac. 126:

"It is a matter of common knowledge that the members of boards of county commissioners are not, as a rule, technical lawyers, and of necessity their acts are more or less informal, and cannot be expected to meet the requirements of technical exactness which characterizes the actions of superior courts;

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and the proper administration of the law intrusted to their care demands a liberal construction of their acts, to the end that substantial justice shall be attained."

To the same effect is *North Yakima v. Scudder*, 41 Wash. 15, 82 Pac. 1022. It seems to us that in this case the record of the commissioners showing their action of October 7, 1907, plainly indicates they intended to, and actually did, reject this claim on that day. We think the record identifies the claim in such manner as to render it certain that the claim here sued upon is the one which was then rejected. The recorded action of the commissioners shows that the claim they rejected was one presented on the same day, was one presented by A. R. Coleman as attorney for Henrietta Maynard, was one for injuries on account of alleged defective county bridge at a stated location, and was one for \$10,000, all of which agrees with the claim sued upon in this action, except for the mere omission of the husband's name from the record of rejection. The record does not in so many words say it was a claim for injuries to Henrietta Maynard, but such is its fair inference. We are of the opinion that the claim sued upon in this action is the same claim presented to and rejected by the county commissioners on October 7, 1907, and since more than three months expired thereafter before the commencement of this action, appellants' right to sue upon such claim became barred by the plain provisions of § 359 of Bal. Code above quoted.

The order and judgment of the superior court taking the cause from the jury and dismissing the action upon the ground that plaintiffs' rights were barred was not erroneous, but a correct disposition of the cause. This renders it unnecessary for us to discuss other assigned errors which would not change our conclusion, whether resolved favorably to or against appellants. We conclude that the judgment of the superior court must be affirmed, and it is so ordered.

RUDKIN, C. J., DUNBAR, CROW, and MOUNT, JJ., concur.

[No. 7800. Decided August 3, 1909.]

LOUISA EASTERLY, *Appellant*, v. JOHN MILLS *et al.*,
Respondents.¹

TRIAL—MOTIONS—WAIVER OF JURY—APPEAL—DECISION WITHOUT REMAND. Where, at the close of plaintiff's case, the defendant moves to discharge the jury and for judgment, and plaintiff moves for a directed verdict, the parties waive a verdict, and authorize judgment by the court; and upon reversing judgment for the defendant, the supreme court will enter judgment for plaintiff without remand for a new trial.

BROKERS—PRINCIPAL AND AGENT—FRAUD ON PRINCIPAL—SECRET PROFIT. Brokers, authorized to make a sale of property at \$4,000, one-half cash, are guilty of a constructive fraud upon their principal and are liable for secret profits made by them, where, in order to effect such sale, they made tentative arrangements to sell to S. for \$4,500, \$500 to be paid in cash, procured the vendor's consent to a sale to W. for \$4,000, one-half cash, and secretly arranged a resale from W. to S. for \$4,500, \$500 cash, according to the tentative agreement, without informing the vendor of such resale or of the fact that W. paid the brokers an additional commission of \$150; as the brokers secretly made an additional profit of \$150 and prevented the vendor from accepting the first sale at \$4,500, and making other arrangements for one-half cash, it being their duty to communicate such offer of S. to their principal.

SAME—COMMISSIONS—CONSTRUCTIVE FRAUD. In such a case, the brokers will not lose their commissions on the original sale, paid by the vendor, where the vendor in her complaint admitted that they were entitled thereto.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered October 26, 1908, by direction of the court, after a trial before a jury, dismissing an action to recover for fraud of an agent. Reversed.

Bates, Peer & Peterson, for appellant.

L. C. Stevenson and *M. F. Porter*, for respondents.

Crow, J.—Action by Louisa Easterly against John Mills and Fred Mills, copartners as John Mills & Son, to recover

¹Reported in 103 Pac. 475.

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a portion of the proceeds of a sale of real estate made by the defendants as her agent. On trial, and at the close of the evidence, the defendants moved the court to discharge the jury and enter judgment in their favor. Thereupon the plaintiff moved for a directed verdict in her favor. The defendants' motion being sustained, the action was dismissed. The plaintiff has appealed.

The appellant contends that the trial court erred in denying her motion for a directed verdict. The respondents insist that the proper judgment was entered, and contend that, even though there had been sufficient evidence in favor of appellant to warrant its submission to the jury, the appellant and respondents by their joint motions withdrew the cause from the jury. When the two motions were interposed, there being no conflict in the evidence as to any material fact, the parties in effect waived a verdict of the jury, and submitted the cause for determination by the trial judge, who was then authorized to enter such judgment as the evidence warranted, and we will on this appeal dispose of the case on the same theory. *Knox v. Fuller*, 23 Wash. 34, 62 Pac. 131; *Grigsby v. Western Union Tel. Co.*, 5 S. D. 561, 59 N. W. 734.

The following facts appear from the evidence: That on February 18, 1907, the appellant, being the owner of certain improved real estate in Puyallup, entered into a written contract whereby she authorized the respondents to sell the same for \$4,000, one-half cash, and agreed to pay them a commission of \$150; that on or about April 29, 1907, one T. Shenkenberg approached the respondent John Mills with a proposition to buy the place for \$4,500, paying \$500 cash and the remainder in installments; that thereafter Mills effected an arrangement with one J. H. Williams, by which he was to purchase the property from the appellant for \$4,000 cash, and immediately sell to Shenkenberg for \$4,500, payable in installments; that before seeing Williams, Mills placed Shenkenberg in possession of the property and accepted \$50 from him as a deposit, with the understanding that if he finally

bought, it should apply on the purchase price, otherwise he was to become appellant's tenant, the deposit to be then applied on rent; that after separate negotiations with Williams and Shenkenberg, the respondent John Mills went to Everett, where Mrs. Easterly lived; that he told her he could sell the place for \$4,000, and effect an arrangement whereby the sale would be for cash, but that he could not sell for any larger sum; that, relying on these statements, appellant finally agreed to sell for \$4,000, executed a deed to Williams reciting a consideration of \$10, and on June 11, 1907, received from respondents a draft for \$3,338, as proceeds of the sale, less commission and expenses incurred. Immediately thereafter a written contract of sale was executed by Williams to Shenkenberg for \$4,500, which was antedated to April 29, 1907, the day upon which the original interview occurred between Shenkenberg and the respondent John Mills. Williams then paid respondents an additional commission of \$150. The respondents did not inform the appellant that they could sell to Shenkenberg for \$4,500; that they had placed Shenkenberg in possession, or that Williams was about to sell to Shenkenberg for \$4,500 and pay them an additional commission of \$150.

In September, 1907, the appellant first learned of the sale to Shenkenberg, and commenced this action to recover the extra \$500, less commission thereon. The respondents have shown that the appellant expressed herself as satisfied with the sale at the time it was closed, and that they were authorized by their written contract of employment to sell for \$4,000. They contend that they could not sell for \$4,500 and secure \$2,000 cash; that the appellant at the time needed more money than the \$500 cash payment Shenkenberg was willing and able to make; that they carried out appellant's specific instructions; that they first made the sale to Williams for appellant, and that after their relation to her as agent had been thus terminated, they made the second sale to Shenkenberg. These contentions are not fully sustained by

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the evidence, but conceding them all to be true, and assuming that no fraud was intended, respondents nevertheless ignored and failed to perform duties which devolved upon them as appellant's agents.

"The relation between a broker and his principal is a fiduciary one, calling for the exercise of the utmost good faith. It is the duty of the broker to serve his principal to the latter's best advantage, and all profits which are the result of the relation belong to the principal." 11 Current Law, 450, and cases cited.

"A broker is not permitted to deal with the subject-matter of his agency for his own advantage, but must give the principal the benefit of any profit he may make in the transaction. Thus where a broker, employed to sell, sells at a higher price than that authorized by the principal, or than that represented by the broker as the price received, or where a broker, employed to purchase, buys at a less price than that limited by or represented to the principal, he must account to his principal for the difference." 4 Am. & Eng. Ency. Law (2d ed.), p. 969.

In *Holmes v. Cathcart*, 88 Minn. 213, 92 N. W. 956, 97 Am. St. 513, 516, 60 L. R. A. 73, the supreme court of Minnesota said:

"The principal may authorize his agent to sell or exchange his property, but it does not necessarily follow that the agent, by carrying out the specific instructions given him, fully performs his duty, and is relieved from liability. He is bound to the exercise of the most perfect good faith, and to keep his principal informed of facts coming to his knowledge affecting his rights and interests. If, after receiving instructions to sell property on certain specified terms, the agent learns that other and more advantageous terms can be obtained, it is his plain duty, and he is under every legal and moral obligation, to communicate the facts to the principal, that he may act advisedly in the premises."

If a real estate broker sells for a price in advance of that stipulated by his principal, and fails to account to the latter or inform him of the true facts, he becomes liable to his principal for the excess. A broker is not entitled to realize

any financial benefit in addition to his stipulated commission as the result of secret negotiations which he conceals from his principal. Such profits in equity and justice belong to the principal, and some of the authorities hold that if the agent realizes a profit from concealed negotiations, he must not only account to his principal therefor, but that he will forfeit his right to the stipulated commission. *Jameson v. Kempton*, 52 Wash. 106, 100 Pac. 186; *Stearns v. Hochbrunn*, 24 Wash. 206, 64 Pac. 165; *De L'Archerie v. Rutherford*, ante p. 134, 102 Pac. 1033; *Collins v. McClurg*, 1 Colo. App. 348; *Humphrey v. Robinson*, 134 N. C. 432, 46 S. E. 953; *Cottom v. Holliday*, 59 Ill. 176; *Jansen v. Williams*, 36 Neb. 869, 55 N. W. 279; *Eidson v. Saxon* (Tex. Civ. App.), 30 S. W. 957; *Dodd v. Wakeman*, 26 N. J. Eq. 484; *Deter v. Jackson*, 76 Kan. 568, 92 Pac. 546; *Helberg v. Nichol*, 149 Ill. 249, 37 N. E. 63. Without regard to the respondents' intentions, they were at least guilty of a constructive fraud. John Mills, the active partner, in part testified as follows:

"Mr. Shenkenberg liked this place very much and they decided to take it, if he could get it on his terms at \$4,500. . . . We told Mr. Shenkenberg we could not sell it to him; that Mrs. Easterly would not sell it to him under those conditions; that she required half or approximately half cash. But, I said, it is possible we can get a third party to carry this title and sell it to you on these terms, and I took the deposit from him with the perfect understanding on his part that we might not be able to get the deal through at all. If we were not able to do that we would either refund his money or the money he paid would apply as rental. Mr. Shenkenberg thoroughly understood that. We had some of his money and we had something to tie to, so that we went out and tried to find somebody that would take that title . . . We finally found Mr. Williams who, for the \$500 bonus, was willing to buy this property, inasmuch as we had Mr. Shenkenberg in tow and could re-sell it for him immediately after for \$4,500 on terms. Under these conditions Mr. Williams was willing to take the place and did take the place. When

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we sold the place to Mr. Williams we were acting for Mrs. Easterly . . . Q. Now, then, you may explain to the jury why that contract of sale was dated back until April, if you know. A. I know exactly why. Money was hard to get and our experience had shown that it was difficult to find a purchaser for that place and as an additional inducement to Mr. Williams we told him that the interest on this contract would start back from the time that Mr. Shenkenberg made his deposit or to that day. Now, this was agreeable to Mr. Shenkenberg. We talked with him and he was agreeable to that and that brought the first annual payment of interest on Mr. Williams' contract that much nearer and was an additional incentive to him to pay out the money and buy this place . . . I will say that we were using every effort at our command to effect this sale for Mrs. Easterly and after we had a tentative agreement with Mr. Shenkenberg that was a very great help in that transaction. In fact, it would have been impossible to have gotten the deal through without the preliminary contract with Mr. Shenkenberg . . . I told Mrs. Easterly the best we could do—the best sale we could make was \$4,000 cash, which was exactly the case . . . The sale could not have gone through without the preliminary arrangement with Mr. Shenkenberg . . . Q. You got a commission from Mr. Williams for making that sale? A. Part of a commission, yes. Q. You got your commission all right from Mrs. Easterly for making this sale? A. Yes, sir. Q. Part of commission—how much of a commission from Mr. Williams? A. \$150.”

In *Kingsley v. Wheeler*, 95 Minn. 360, 104 N. W. 543, the court said:

“An agent to sell land does not fulfill the measure of legal requirements by merely carrying out his specific instructions. He owes the duty of making a full, fair, and prompt disclosure of all facts affecting the principal's rights or interests, or pertaining to the sale of land by him. He is denied the right to profit at the expense of his principal by concealment of facts which he ought to have revealed. Whatever advantage accrues to him by violation of his duties he must make good to his principal whom he has wronged.”

Although it was their duty to do so, respondents never

communicated to appellant the fact that they could sell to Shenkenberg for \$4,500 on his terms. Had they done so, she, being thus advised, might have effected a more satisfactory and less expensive arrangement for realizing the cash which she then needed. She was at least entitled to the chance of doing so. Respondents had negotiated with Shenkenberg and placed him in possession in contemplation of a sale for \$4,500. As the result of their negotiations with him and Williams, they collected an additional commission of \$150 of which appellant was ignorant. This they were not entitled to do, and any profit thus secretly earned by them must inure to her benefit. There is no evidence showing that Williams was in collusion with the respondents, or that he knew of their concealment of the actual facts from appellant. Although some courts have announced the rule that in cases of this kind the agent loses his right to a commission, we cannot apply any such rule here, as the appellant in her complaint has conceded respondents' right to the stipulated commission on the original sale. Their additional profit, realized from secret negotiations, was the \$150 received from Williams without appellant's knowledge, and we now hold that they must account to appellant for that sum, she being entitled to a directed verdict therefor.

Respondents, as evidence of their good faith, contend that they conducted no negotiations for a sale to Williams until after their agency for the appellant had been terminated. There is no question, however, but that their original negotiations were with Shenkenberg, and that they would not have entered into any arrangement with Williams had they not relied on such original negotiations with Shenkenberg and the deposit of the \$50 made by him, which they concealed from appellant. They were undoubtedly appellant's agents when dealing with Williams.

The judgment is reversed and the cause remanded with instructions to enter judgment in favor of appellant for

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\$150, with interest from June 11, 1907, and costs. The appellant will recover her costs in this court.

RUDKIN, C. J., MOUNT, PARKER, DUNBAR, FULLERTON, CHADWICK, and GOSE, JJ., concur.

[No. 7934. Department One. August 3, 1909.]

H. M. GOULD *et al.*, *Appellants*, v. FRANK I. STANTON *et al.*,
Respondents.¹

PROCESS—SUMMONS FOR PUBLICATION—SUFFICIENCY. Under Laws 1897, p. 182, § 96, subd. 3, a summons by publication requiring the defendant to appear within sixty days after the "service" of the summons is not in accordance with the statute, and is insufficient to confer jurisdiction to enter a judgment of default.

TAXATION—REDEMPTION—ACTIONS—CONDITION PRECEDENT—TENDER OF TAX—WAIVER. In an action to recover lands sold under void tax foreclosure proceedings, a tender of the amount paid out for taxes, as a condition precedent to the action, is waived where defendants refused an insufficient tender and asserted title and absolute ownership, showing that any tender would have been ineffectual.

Appeal from a judgment of the superior court for King county, Morris, J., entered October 12, 1908, dismissing an action to quiet title and recover lands sold for taxes, after a trial before the court without a jury. Reversed.

H. H. Eaton (*Sullivan & Stevens*, of counsel), for appellants.

A. C. MacDonald, for respondents.

CHADWICK, J.—On February 2, 1901, defendants' grantor purchased at tax foreclosure sale a tract of land known as Tract 2, of Day's Acre Gardens, now situated in the city of Seattle. The property has ever since been in the possession of the defendants and the grantors, since which time they

¹Reported in 103 Pac. 459.

have paid all taxes, assessments, and charges against the property. Improvements, by way of a house, fruit trees, berry patches, clearing and grading, have been made, of the alleged value of about \$1,500. The tax proceeding was irregular, in that the summons was in the form condemned in *Gould v. Knox*, 53 Wash. 248, 101 Pac. 886, and cases cited therein. On May 15, 1907, plaintiffs purchased of the original owners all of their "right, title, claim and interest and estate" in the property involved, for a nominal consideration, and have brought this action to recover possession and quiet their title thereto. From a decree in favor of defendants, plaintiffs have appealed.

The assignments of error raise two questions, (1) the sufficiency of the tax proceeding, and (2) the sufficiency of the tender made to respondents before this action was begun. The first point may be passed without discussion. The summons commanded the defendants to "appear within sixty days after the date of service of the summons," and was insufficient under the authorities cited. Passing to the second question, appellants' attorney swore that he offered respondents the sum of \$125 in full payment of all taxes, interest, penalties, and costs incurred by them and their grantors, which tender was refused. The point is made by respondents that the sum tendered was insufficient. A calculation of the items appearing in the record convinces us that this point is well taken. The amount due was a sum in excess of \$125, and respondents must prevail unless we hold that a sufficient tender has been waived.

In the case of *Gould v. Knox*, *supra*, we held that a tender could be waived and that the testimony in that case in connection with an assertion of title was enough to show that a tender in any sum would have been ineffectual. We can see no difference between that case and this one. If the insufficiency of the tender was the only defense relied upon, plaintiffs could not recover. But defendants have set up ownership, and a tender thus becomes immaterial; this

upon the theory that ownership is an absolute defense, if proven. There is no difference between the law of demand and the law of tender, when made a condition precedent to an action. The plea of ownership is generally held to excuse both. *Gould v. Knox*, *supra*; *Seattle Nat. Bank v. Meerwaldt*, 8 Wash. 680, 36 Pac. 763; *Kimball v. Farmers & Mechanics Bank*, 50 Wash. 610, 97 Pac. 748; *Burrows v. McCalley*, 17 Wash. 269, 49 Pac. 508; *Griesemer v. Mutual Life Ins. Co.*, 10 Wash. 202, 38 Pac. 1031; *Zeimantz v. Blake*, 39 Wash. 6, 80 Pac. 822; *Bender v. Bean*, 52 Ark. 132, *Bright v. Boyd*, 1 Story (U. S.) 478; 27 Am. & Eng. Ency. Law (2d ed.), 857-8; Hunt, Tender, par. 26.

Therefore, upon the authority of the former decisions of this court, the judgment of the lower court is reversed, with instructions to the trial court to ascertain the value of improvements to which respondents may be entitled under chapter 137, Laws 1903, p. 262, and to enter judgment accordingly.

RUDKIN, C. J., FULLERTON, and GOSE, JJ., concur.
MORRIS, J., took no part.

[No. 8070. Department One. August 3, 1909.]

THE STATE OF WASHINGTON, *on the Relation of Milwaukee Terminal Railway Company, Plaintiff*, v. THE SUPERIOR COURT FOR KING COUNTY *et al., Respondents*.¹

EMINENT DOMAIN—RAILROADS—POWER TO CONDEMN—PUBLIC SERVICE—EXTENT—GOOD FAITH. A railway terminal company organized primarily to connect business enterprises of a city with terminals of a railroad company in another city, by means of tracks and car ferries, and to carry freight in car load lots between such points, is a railroad company entitled to condemn land, where it has shown its good faith by expending \$100,000, and has under contract equipment that will cost \$400,000 additional for barges, car floats, and terminals, although it owns no rolling stock.

¹Reported in 103 Pac. 469, 104 Pac. 175.

SAME—PUBLIC USE—PRIOR USE BY RAILROAD—LAND LEASED TO PATRON. Strips of land owned by a railroad company, fifteen feet wide, adjacent to a street in which the railroad company has its railroad tracks, are not devoted to a public use so as to exempt them from condemnation for a public use by another railroad company, where it appears that they had never been used for railroad tracks but were in possession of a mill company under leases for nominal rent or rent free, and were used by the mill for loading platforms, although such use was a convenience to the mill as a patron of the owning railroad company; the test being the use to which the property is applied as a matter of right, and not the ownership.

SAME—NECESSITY—REASONABLENESS. In such a case, the question of the reasonable necessity requisite to authorize condemnation does not depend on the fact that other property might be appropriated for the purposes of the relator, nor on the fact that it would increase the cost to the mill company of loading cars and result in a loss of business to the defendant railway company, especially where the defendant has other property that can be used for loading platforms, as these are questions largely of expediency; it appearing that the route of relator's spur track is the most feasible one and reasonably necessary.

APPEAL—REHEARING. A rehearing will not be granted to enable the petitioner to present a question not raised on the original hearing or considered by the court.

Certiorari to review a judgment of the superior court for King county, W. H. Bogle, Esq., judge *pro tempore*, entered April 22, 1909, dismissing condemnation proceedings, upon finding a prior public use of the property sought to be condemned, after a hearing on the merits. Reversed.

H. H. Field and *George W. Korte*, for relator.

F. V. Brown and *Frederic G. Dorety*, for respondents, to the point that the use of property for loading platforms was a public use, cited: *Butte A. & P. R. Co. v. Montana Union R. Co.*, 16 Mont. 504, 41 Pac. 232, 50 Am. St. 508, 31 L. R. A. 298; *Hoke v. Georgia R. & Banking Co.*, 89 Ga. 215, 15 S. E. 124; *Mobile & G. R. Co. v. Alabama Midland R. Co.*, 87 Ala. 520, 6 South. 407; *Union Terminal R. Co. v. Kansas City Belt R. Co.*, 9 Kan. 281, 60 Pac. 541; *Louisiana*

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Opinion Per GOSZ, J.

& *N. W. R. Co. v. Vicksburg S. & P. R. Co.*, 112 La. 915, 36 South. 803; *Boston & Maine R. v. Lowell & Lawrence R.*, 124 Mass. 368; *Pittsburg Junction R. Co.'s Appeal* (Pa.), 6 Atl. 564. A railroad company seeking to condemn property connected with another company's right of way must show that the proposed taking will not interfere with the operations of the owning company. *State ex rel. Portland & Seattle R. Co. v. Superior Court*, 45 Wash. 270, 88 Pac. 201; *State ex rel. Spokane Falls & N. R. Co. v. Superior Court*, 40 Wash. 389, 82 Pac. 417; *Seattle & Montana R. Co. v. Bellingham Bay etc. R. Co.*, 29 Wash. 491, 69 Pac. 1107, 92 Am. St. 907; Lewis, *Eminent Domain* (2d ed.), p. 627, § 267, p. 629, § 267a; 10 Am. & Eng. Ency. Law (2d ed.), 1096, 1097; 15 Cyc. 618; *Atchison etc. R. Co. v. Kansas City etc. R. Co.*, 67 Kan. 569, 70 Pac. 939, 73 Pac. 899; *Barre R. Co. v. Montpelier & W. R. Co.*, 61 Vt. 1, 17 Atl. 923, 15 Am. St. 877, 4 L. R. A. 785; *Birmingham & A. R. Co. v. Louisville & N. R. Co.*, 152 Ala. 422, 44 South. 679.

GOSZ, J.—The Great Northern Railway Company, hereafter called the respondent, is the owner of two detached strips of land, in that part of Seattle formerly known as Ballard, and lying southerly of, and adjacent to, Shilshole avenue. The tract designated No. 1 is 150 feet in length, and tract No. 2 is 250 feet in length. Each tract is fifteen feet in width. There is an intervening strip of land, seventy-five feet in length and fifteen feet in width, which is owned by the Bolcom Mills Company, subject to an easement or right of way in the Milwaukee Terminal Railway Company, hereafter called the relator. Between the west line of Fifteenth avenue northwest and tract No. 1, and southerly of and contiguous to Shilshole avenue, the Motor Shingle Company owns a strip of land fifteen feet in width and 122 74-100 feet in length, which the relator is condemning in a separate proceeding. At the westerly end of tract No. 2, lying along the south side of Shilshole avenue, the respondent railway

company owns a strip of land 194 74-100 feet in length and fifteen feet in width, not embraced in this condemnation proceeding. The Bolcom Mills plant extends southerly from tract No. 2 to the water front. Tracts 1 and 2 were acquired by the Seattle and Montana Railway Company in 1890, and by the respondent company July 1, 1907. The Bolcom Mills Company has occupied these tracts since 1890.

There are three railroad tracks in Shilshole avenue, as follows: (1) Mills Siding, near the south line of the avenue, used jointly by the Great Northern and Northern Pacific Railway Companies for loading purposes; (2) the Great Northern track; (3) the Northern Pacific track. Bolcom Mills Company has a loading platform fifty feet in width on the south side of Shilshole avenue. The two tracts in controversy are covered by this platform. The plant of the Bolcom Mills does not extend along tract No. 1.

On the 16th day of February, 1909, relator filed its petition in the lower court to condemn for its proposed railroad track all of tract No. 1 and 55 26-100 feet off the easterly end of tract No. 2. Tract No. 2 is westerly from tract No. 1. At the south end of Fifteenth avenue, at the harbor line, the relator is constructing a transfer bridge. From this bridge its proposed line of road extends up Fifteenth avenue, with spur tracks up Shilshole avenue and at Thirteenth avenue. It has under construction two barges, each capable of carrying twelve loaded cars. It contemplates the construction of a car transfer bridge at the terminals of the Chicago, Milwaukee & Puget Sound Railroad Company, at Seattle and Tacoma. Its barges will be towed by tugs propelled by steam or electric power. It is negotiating with the Seattle Electric Company to handle the cars with electric motors. Its entire capital stock has been subscribed and is owned by the Chicago, Milwaukee & Puget Sound Railway Company. The relator has expended \$100,000, and has under contract equipment which will cost about \$400,000 additional. These expenditures cover construction of barges, car floats, and ter-

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minals at the tide lands at Tacoma, Seattle, and Ballard. It is not now operating any railroad or transfer plant, nor does it own any locomotives, freight or passenger cars, nor has it any locomotives or cars under construction.

At the trial, the parties stipulated, that the board of trustees of the relator had adopted its definite location of certain tracks which had theretofore been located in Fifteenth avenue, and a certain spur track extending from a point of connection with said tracks in Fifteenth avenue in a northwesterly direction across the land sought to be condemned; that it is a corporation organized under the laws of the state for the objects set forth in its petition. The petition avers that the relator is authorized by its articles of incorporation to locate, construct, and operate railroads, freight terminals, transfer and switching grounds, docks, wharves, slips, and landing places, and by means thereof to do and carry on the business of a common carrier of freight and passengers for hire in this state, and to own, maintain, and operate boats, barges, floats, locomotives, cars, motors, and other means of transportation, and to operate the same by steam, electric or other power, for carrying on its business of a common carrier, and to acquire by purchase, condemnation, or otherwise, land, rights of way, and easements for the construction, maintenance, and operation of railroad tracks and other facilities above mentioned; that it has surveyed and located railroad tracks in that part of the city of Seattle known as Ballard, and that it proposes to construct, maintain, and operate said tracks in connection with the transfer bridge and car ferry to be located at the southerly terminus of Fifteenth avenue, which bridge, car ferry, and tracks are to be used and operated in carrying on its business as a common carrier; that it intends to construct said tracks in said street and across the tracks heretofore mentioned, and to use the tracks for switching, transferring, and delivering both empty and loaded cars as a means of transferring said cars to and from

the mills and industries along the tracks to and from terminal grounds, docks, warehouses, and stations of other railway companies and in the city of Seattle in the prosecution of its business as a common carrier; that for these purposes it is necessary for it to acquire such property.

The case was tried to the court on the petition, the stipulation, and oral testimony; whereupon the court made its findings of fact as follows:

"(1) That the Terminal Company is a railroad company and that the service it has performed and will perform, is a public service and a public convenience.

"(2) That the contemplated use for which the land described in the petition is sought to be appropriated is really a public use; that the public interest requires the prosecution of such enterprise and that said land is required and necessary for the purposes of the construction, maintenance and operation of petitioner's proposed railroad.

"(3) That the land sought to be appropriated is already appropriated and devoted to a prior public use, to wit, to the use of the Great Northern Railway Company; that said lands are needed by said company to enable it to efficiently discharge its duties as such public service and common carrier corporation, and that the appropriation thereof by the petitioner will interfere with the operation of the track of the respondent, now located upon the property adjoining the same, and that the respondent would suffer a material detriment in the operation of its said track by being deprived of said property."

As a conclusion of law, the court found that the property could not be appropriated, and entered a judgment of dismissal. The relator excepted to the third finding of fact, and the conclusion of law. The respondent excepted to the findings of fact 1 and 2. On the application of the relator, the court granted a writ of review. The relator assigns error on the third finding of fact, the conclusion of law, and the judgment of dismissal.

The respondent urges two propositions in support of the judgment, (1) that the relator is not a railroad corporation

within the meaning of the eminent domain statute; (2) that the property sought to be condemned is already devoted to a public use, and that there is not a sufficient showing of necessity for its appropriation. We will consider these propositions in the order stated.

Pierce's Code, §§ 7053, 7054 [Bal. Code, §§ 4250, 4251, as amended, L. '05, p. 27.] provides the manner of executing articles of incorporation "for building, equipping, and running railroads," and provides that no railroad corporation "shall commence business or institute proceedings to condemn land for corporate purposes until the whole amount of its capital stock has been subscribed." It has been stipulated that the relator has complied with the terms of this statute. The statute does not require that the articles of incorporation shall state the route, length or points of termini of the road. In support of its first contention, the respondents cite *State ex rel. Kent Lumber Co. v. Superior Court*, 46 Wash. 516, 90 Pac. 663; *People ex rel. Bernard v. Cheeseman*, 7 Colo. 376, 3 Pac. 716; *New Orleans Terminal Co. v. Teller*, 113 La. 733, 37 South. 624; *In re Niagara Falls & W. R. Co.*, 108 N. Y. 375, 15 N. E. 429; *Garbutt Lumber Co. v. Georgia & A. R. Co.*, 111 Ga. 714, 36 S. E. 942, and *Memphis Freight Co. v. Memphis*, 4 Cold. 419.

In the *Kent Lumber Co.* case the court held that the relator's railroad was a private one, used for hauling logs to its mill, and that the relator was not engaged in a public business. In the *Cheeseman* case the court concluded that the condemnor has "no intention of constructing or operating a railroad." In the *New Orleans Terminal* case evidence had been excluded tending to show that the plaintiff was a mere paper corporation, that there was no subscription of its capital stock, that it had assumed the garb of a railway corporation in order to appropriate property for purely speculative purposes, that no lines had been surveyed, nor workmen employed to construct tracks and terminals, and no work had been done toward building any kind of a rail-

road. This was held to be error. In the *Niagara Falls* case the proposed road did not connect with a public highway, and it could be reached only by passing over land belonging to the state or the land of private owners. There was no habitation, traffic, or business along the line of the road, except in carrying passengers to see the river and returning them to the point from which they started. Its season of operation was confined to the carrying of sightseers during about four months of the year. In the *Garbutt Lumber Co.* case the lumber company owned timber on both sides of a line of railroad and sought to appropriate a right of way across the right of way for a tram road to accommodate its private business in the handling of its own timber. In the *Memphis* case the plaintiff sought to appropriate private property to be used by it in loading and unloading freight on or from boats that touched at the port of Memphis. The court held in each of these cases that the proposed use was a private one.

In *Bridwell v. Gate City Terminal Co.*, 127 Ga. 520, 56 S. E. 624, 10 L. R. A. (N. S.) 909, the party seeking to condemn was organized as a terminal company, and was undertaking to build a road principally within the city of Atlanta. Speaking to the question as to whether it was a railroad company within the meaning of the law, at page 523, the court said:

"No minimum limit as to length is fixed by the statute. In defining a common carrier as 'one who pursues the business constantly or continuously, for any period of time, or any distance of transportation,' the code does not indicate any length of road which the company must have in order to be a common carrier. Civil Code, § 2264. It is possible that a charter might not be granted to operate a railroad a few feet in length, or for so short a distance that it would be practically impossible of operation as a common carrier; or if a charter should be granted, it is possible that the courts might hold that such a venture was not a genuine railroad within the meaning of the law, so as to condemn property.

But it cannot be said, as a matter of law, that merely because a commercial steam railroad will only be about three miles in length, it will be no railroad at all."

And, continuing at page 525, it said:

"But we cannot see how, as matter of law, it can be said that a company incorporated for the purpose of building and operating a railroad three miles in length for the carrying of goods and passengers can be said to be no railroad company at all because it selects the name of 'Terminal Company.'"

In *Riley v. Charleston Union Station Co.*, 71 S. C. 457, 51 S. E. 485, 110 Am. St. 578, the party seeking to condemn was incorporated for the purpose of constructing and maintaining a union passenger station in the city of Charleston, and to this end was given the right to acquire by purchase, lease, or condemnation all property necessary for the same. The court held that, if it was not in fact a railroad company, its main purposes were clearly within the objects of such a company, and so clearly analogous thereto as to warrant the court in applying to it the rules of law applicable to a regular railroad corporation in determining whether the property it sought to condemn was for a public purpose. In *State ex rel. Little v. Martin*, 51 Kan. 462, 33 Pac. 9, at page 476, speaking to this question, it is said:

"It [the road] may be long, or it may be short, at the option of the promoters, provided it is built in good faith for a public use, and within the contemplated purposes of the statute."

In *State ex rel. Trimble v. Superior Court*, 31 Wash. 445, 72 Pac. 89, 66 L. R. A. 897, it was held that the fact that the company seeking to appropriate the property did not own any cars or locomotives and had leased its line of road to other companies, did not deprive it of the right to take property under the power of eminent domain. See, also, *State ex rel. Harlan v. Centralia-Chehalis Elec. R. & P. Co.*, 42 Wash. 632, 85 Pac. 344, 7 L. R. A. (N. S.) 198. As we have said,

our statute does not require that a projected line of railroad shall be of any prescribed length in order that the party projecting it may exercise the right of eminent domain. We apprehend that the true test is that the party seeking to condemn must be acting in good faith, and that the projected road shall serve a public purpose. Measured by this test, the relator is a railroad company within the meaning of the law. Its primary purpose is to connect the business enterprises of Ballard with the terminals of the Chicago, Milwaukee & Puget Sound Railroad Company in the city of Seattle proper, and to carry freight in carload lots between such points. It is not necessary that it should use its own rolling stock. If it provides the tracks, cars, and the motive power, and serves the public within the limits proposed, it will be doing a public business. Its good faith is evidenced, as we have pointed out, by the money it has already expended and the equipment which it has under contract.

We will next consider whether the property sought to be appropriated is now devoted to a public use. We have seen that it is occupied by the loading platform of the Bolcom Mills Company. This company is in possession of tract No. 1 under a written lease, upon a yearly rental of \$25, and terminable upon ten days' notice. It holds tract No. 2 under a verbal license, rent free. The respondent's tracks are in Shilshole avenue, and it has never used any part of the property in question. These platforms are used in loading the cars of the respondent company and of the Northern Pacific Railway Company when switched onto the mill track, with the products of the Bolcom Mills. If the property was a part of the right of way, yards, or terminals of the respondent, or directly used by it in the discharge of its duties as a common carrier, strong evidence of necessity upon the part of the relator would be required. It could not be successfully contended that the right of eminent domain could be exercised by a railroad company to condemn land for the purpose of leasing to patrons for their personal convenience. The fact that

this strip of ground adds to the convenience of the mill company in loading its products upon the cars of respondent, does not make its use a public one. A use will not be classified as a public one merely because it may economize the handling of the products of a patron of a common carrier. The exemption from condemnation, if any, must rest upon the ground that the public interest would suffer by an appropriation of the property for the use of the relator for track purposes. If the property was owned by the mill company and used as it now is, it would not be claimed that it was serving a public use. The fact that it is owned by the railway company and used by the mill company cannot change a private use into a public one. It is the use to which the property is applied and not the ownership, that marks such use as public or private. The true test of whether the use is public is well stated in *Farmers' Market Co. v. Philadelphia etc. R. Co.*, 142 Pa. St. 580, 21 Atl. 902, 989, at page 587 where it is said:

"The true criterion by which to judge of the character of the use is whether the public may enjoy it by right, or only by permission. The test is, not what the corporation owning the land may choose to do, but what under the law it must do."

Speaking to this question, in *Diamond Jo Line Steamers v. Davenport*, 114 Iowa 432, 87 N. W. 399, 54 L. R. A. 859, at page 434, it is said:

"The mere use of the property for public purposes, is then, not enough to give the exemption. Such property, it seems, must be impressed with a trust in favor of the public so that the latter's use is of right, and not of grace; and this right must be one which cannot be defeated or destroyed at the owner's will."

See, also, *In re New York etc. R. Co. v. Union Steamboat Co.*, 99 N. Y. 12, 1 N. E. 27. Measured by the rule announced by the authorities from which we have quoted, it cannot be said that the property is now devoted to a public use.

We next inquire whether the relator has shown a reasonable necessity for the appropriation of the property. The respondent urges that it has failed in this respect, for two reasons: (1) that it could condemn the property of the mill company immediately south of the property in controversy; (2) that an appropriation should not be allowed, because it will double the cost of loading the products of the Bolcom Mills on the respondent's cars, and thereby result in a loss of business to the respondent. These are largely questions of expediency, and can hardly be said to go to the question of the right to appropriate. It is fundamental that, when the property of A is sought to be taken for a public use, he cannot defend on the ground that it is just as feasible to appropriate the property of B. Moreover, if the relator's right of way should be located south of respondent's land, the expense of loading on the latter's cars from the Bolcom Mills would be further increased. From the facts heretofore stated, it will be seen that the respondent owns 194 feet of ground westerly from the property in controversy, upon which is located a loading platform extending southerly to the Bolcom Mills, over which the latter's products can be loaded on respondent's cars. So far as the convenience of loading onto the respondent's cars from the Bolcom Mills is concerned, the appropriation of the property in controversy will only result in lessening the length of platform for such purpose. We have seen that the loading platform and plant of the Bolcom Mills Company extends south from respondents' property to the water front. Upon all the facts in the record, the route adopted by the relator for its spur track is the most feasible, and a reasonable necessity exists for the appropriation. This is all the law requires. *State ex rel. Kent Lumber Co. v. Superior Court*, 46 Wash. 516, 90 Pac. 663; *North Coast R. Co. v. Northern Pac. R. Co.*, 48 Wash. 529, 94 Pac. 112; *State ex rel. Skamania Boom Co. v. Superior Court*, 47 Wash. 166, 91 Pac. 637.

It is finally urged that the proposed track will be only twelve feet from the mill track, measured from center to center, and that this does not afford a sufficient clearance. We think that the evidence shows that this is the usual clearance on spur tracks. The relator is equally interested with the respondent in having a sufficient clearance, and we are therefore inclined to adopt its view in this respect.

Other incidental questions are discussed in the briefs, which go to the advisability of the appropriation rather than to the broad public question which is necessarily controlling in cases of this character.

The judgment will be reversed, with directions to the trial court to proceed in conformity with this opinion and the prayer of the petition.

RUDKIN, C. J., FULLERTON, and CHADWICK, JJ., concur.

ON REHEARING.

[*En Banc*. Decided October 5, 1909.]

PER CURIAM.—The respondent has filed a petition for a rehearing *en banc*, wherein it seeks to raise the question that the condemnation sought is for a private and not a public use. This question was not raised, either in the original briefs or in the oral argument, and was not considered by the court. The questions urged by the respondent were: (1) That the relator is not a railroad corporation within the meaning of the eminent domain statute; (2) that the property sought to be condemned was already devoted to a public use, and (3) that there was not a sufficient showing of necessity of appropriation. We cannot sanction the practice of permitting new questions to be raised in a petition for rehearing.

“It is the policy of the law to require parties to present all questions in the briefs originally filed, and not to permit new points to be made in the petition for a rehearing. The rule adopted pursuant to this policy is a salutary one, and one dictated by considerations of justice as well as of expediency. If parties were permitted to submit cases without pre-

senting all the material points a loose and slovenly practice would be encouraged, and the administration of justice would be delayed and embarrassed. To tolerate such a practice would impose the duty upon the courts of examining and deciding cases in detached parts, and thus delay decisions, produce confusion and encourage conduct not consistent with fair dealing and good morals." Elliott, App. Proc., § 557.

The petition will therefore be denied.

[No. 8146. *En Banc*. August 3, 1909.]

THE STATE OF WASHINGTON, *on the Relation of R. F. Lytle et al., Plaintiff*, v. SUPERIOR COURT FOR CHEHALIS COUNTY *et al., Respondents*.¹

COURTS—ESTABLISHMENT—COUNTIES—DIVISION INTO JUDICIAL DISTRICTS—CONSTITUTIONAL LAW. Const. art. 4, § 5, providing that there shall be in each county of the state a superior court, with one or more judges thereof, provides for but one court in a county, and is violated by Laws 1909, p. 82, providing that the county commissioners may divide a county into independent judicial districts, each of which is a judicial unit, with its own seal, officers, records, and with jurisdictions restricted to the limits of the district, from which jurors are drawn and changes of venue granted or received, and a distinctive style of actions and proceedings is employed, and providing that in criminal actions, each district shall be considered as a separate constitutional county.

SAME. Laws 1909, p. 82, providing that the county commissioners, "whenever they determine it to be for the best interests of the people," may divide a county into judicial districts each of which is constituted a "separate and distinct constitutional county" for the purposes of the act, contravenes Const., art. 11, § 3, which provides that a new county shall not be formed containing less than 2,000 inhabitants.

SAME. Said act contravenes Const., art. 4, § 6, which confers upon superior courts jurisdiction of all certain enumerated actions and proceedings arising in their respective counties.

Application filed in the supreme court June 12, 1909, for a writ of prohibition to prevent the superior court for Che-

¹Reported in 103 Pac. 464.

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Citations of Counsel.

halis county, Irwin, J., from approving or acting upon the division of Chehalis county into judicial districts, under Laws 1909, p. 82. Granted.

W. H. Abel, Morgan & Brewer, Chas. W. Smith, and E. A. Philbrick, for relators, contended, among other things, that the legislature has no right to limit the constitutional jurisdiction of the court. *State ex rel. Amsterdamsch Trustees Kantoor v. Superior Court*, 15 Wash. 668, 47 Pac. 31, 55 Am. St. 907, 37 L. R. A. 111; *In re Waugh*, 32 Wash. 50, 72 Pac. 710; *Popfinger v. Yutte*, 102 N. Y. 38, 6 N. E. 259; *Hutkoff v. Demorest*, 103 N. Y. 377, 8 N. E. 899, 10 N. E. 535; *Flynn v. Central R. Co.*, 142 N. Y. 439, 37 N. E. 514; *Mussen v. Ausable Granite Works*, 18 N. Y. Supp. 267; *Hicks v. Bell*, 3 Cal. 219; *Zander v. Coe*, 5 Cal. 230; *Haight v. Gay*, 8 Cal. 297, 68 Am. Dec. 323; *People ex rel. Busby v. Howland*, 17 App. Div. 165, 45 N. Y. Supp. 347; *Leach v. State*, 36 Tex. Cr. 248, 36 S. W. 471; *State ex rel. Board of Railroad Com'rs v. Wilmington & W. R. Co.*, 122 N. C. 877, 29 S. E. 334; *Parsons v. Tuolumne Water Co.*, 5 Cal. 43, 63 Am. Dec. 76; *Flanagan v. Plainfield*, 44 N. J. L. 118; *Callanan v. Judd*, 23 Wis. 343; *McDermont v. Dinnie*, 6 N. D. 278, 69 N. W. 294; *State ex rel. Schalk v. Wrightson* (N. J.), 32 Atl. 820; *People ex rel. Bolton v. Albertson*, 55 N. Y. 50; *Ex parte Cox*, 44 Fla. 537, 33 South. 509; *Brown v. Kalamazoo County Circuit Judge*, 75 Mich. 274, 42 N. W. 827, 13 Am. St. 438, 5 L. R. A. 226; *State ex rel. Vance v. Wilson*, 30 Kan. 661, 2 Pac. 828; *Graham v. Cowgill*, 13 Kan. 114; *State ex rel. Keeler v. Allen*, 5 Kan. 213; *Marbury v. Madison*, 1 Cranch 137, 2 L. Ed. 60; *Florida v. Georgia*, 17 How. 478, 15 L. Ed. 181; *Harrison v. Nixon*, 9 Pet. 483, 9 L. Ed. 201; *California v. Southern Pac. Co.*, 157 U. S. 229, 15 Sup. Ct. 591, 39 L. Ed. 683; *Jim v. State*, 3 Mo. 147; *Ex parte Vallandigham*, 1 Wall. 243, 17 L. Ed. 589; *Virginia v. Rives*, 100 U. S. 313, 25 L. Ed. 667. The act violates section 2 of article 14 of the constitution, in that it

authorizes a partial removal of the county seat without a vote of the people. *Board of Commissioners of White County v. Gwin*, 136 Ind. 562, 36 N. E. 237, 22 L. R. A. 402; *Williams v. Reutzel*, 60 Ark. 155, 29 S. W. 374; 7 Am. & Eng. Ency. Law (2d ed.), p. 1012; *Whitener v. Belknap*, 89 Tex. 273, 34 S. W. 594; *Coulter v. Routt County*, 9 Colo. 258, 11 Pac. 199; *State ex rel. Attorney General v. Moores*, 55 Neb. 480, 76 N. W. 175, 41 L. R. A. 624. The right to trial by jury drawn from the body of the county, is part of our common law, and under the constitution must remain inviolate. 24 Geo. II, ch. 18; 6 Geo. IV, ch. 50; 20 Stat. at Law, p. 184; 65 Stat. at Law, p. 438; Laws 1854, p. 431; Laws 1863, p. 88; Const., art. 1, § 21; *Swart v. Kimball*, 43 Mich. 443, 5 N. W. 635; *McRae v. Grand Rapids etc. R. Co.*, 93 Mich. 399, 53 N. W. 561, 17 L. R. A. 750; *Hewitt v. Saginaw Circuit Judge*, 71 Mich. 287, 39 N. W. 56; *United States v. Dixon*, 44 Fed. 401; *Hartshorne's Lessee v. Patton*, 2 Dal. (Pa.) 252; *White v. Commonwealth*, 6 Binn. (Pa.) 179; *Shaffer v. State*, 1 How. (Miss.) 238.

John C. Hogan and J. B. Bridges (Theo. B. Bruener, J. C. Cross, Boner & Boner, W. I. Agnew, C. W. Hodgdon, and Glen Snider, of counsel), for respondents, contended, *inter alia*, that a statute can be declared unconstitutional only where specific restrictions have been violated. Black, Interpretation of Laws, p. 93, and cases cited; *Smith v. Seattle*, 25 Wash. 300, 65 Pac. 612; *State v. Vance*, 29 Wash. 435, 70 Pac. 34; *Ogden v. Saunders*, 12 Wheat. 213, 270, 6 L. Ed. 606; Cooley, Const. Lim. (6th ed.), pp. 194, 204, 391; *Chicago & N. W. R. Co. v. Dey*, 35 Fed. 866. The legislature may create judicial districts comprising less than the whole county from which jurors may be selected, etc. 24 Cyc. 190; 12 Plead. & Prac. 289; *State v. Kemp*, 34 Minn. 61, 24 N. W. 349; *Ellis v. State*, 92 Tenn. 85, 20 S. W. 500; *Swart v. Kimball*, 43 Mich. 443, 5 N. W. 635; *Poindexter v. Commonwealth*, 74 Va. 766; *Baccigalupo v. Commonwealth*,

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74 Va. 807, 36 Am. Rep. 795; *Colt v. Eves*, 12 Conn. 251; *Gardiner v. People*, 6 Parker (N. Y. Crim. R.) 155; *State ex rel. Clark v. Neterer*, 33 Wash. 535, 74 Pac. 668; *Shaffel v. State*, 97 Wis. 377, 72 N. W. 888; *People v. Stokes*, 103 Cal. 193, 37 Pac. 207, 42 Am. St. 102; *State v. Pugsley*, 75 Iowa 742, 38 N. W. 498; *State ex rel. Brown v. Stewart*, 60 Wis. 587, 19 N. W. 429, 50 Am. Rep. 388; *United States v. Stowell*, 2 Curtis (U. S.) 153; *United States v. Richardson*, 28 Fed. 61; *United States v. Chaires*, 40 Fed. 820; *Agnew v. United States*, 165 U. S. 36, 17 Sup. Ct. 235, 41 L. Ed. 624. Creating a place for the holding of court at a place other than at the county seat, is not a removal of the seat of justice. 11 Cyc. 717; *Smith v. Hall*, 71 Conn. 427, 42 Atl. 86; *Whallon v. Gridley*, 51 Mich. 503, 16 N. W. 876; *Bourne v. Salin*, 28 Ky. Law 555, 89 S. W. 673; *Ellis v. State*, *supra*; *Woods v. McCay*, 144 Ind. 316, 43 N. E. 269, 33 L. R. A. 97; *Dunlap v. Thomas*, 69 Iowa 358, 28 N. W. 637; *Lyon v. Board of Supervisors of Steuben County*, 100 N. Y. Supp. 676; *Trimble v. State*, 2 Iowa 404; *Lee County v. Deming*, 3 Iowa 101; *Bouldin v. Ewart*, 63 Mo. 330; *Ex parte Shean*, 25 Ohio St. 440; *Waller v. Tully*, 75 Ill. 576; *Commonwealth v. Scott*, 10 Gratt. 749; *Willie v. Parkhurst*, 31 N. H. 415; *Rosencrans v. United States*, 165 U. S. 257, 17 Sup. Ct. 302, 41 L. Ed. 708.

MORRIS, J.—Application for peremptory writ of prohibition, the issuance of which involves the constitutionality of Laws 1909, page 82, chap. 49, entitled:

“An Act relating to the dividing of counties into districts for judicial purposes, and for holding sessions of the Superior Court of the State of Washington at places other than the county seat, and providing means to make this act effective, and defraying the expenses incident thereto, and declaring an emergency.”

The entire act is involved in the questions submitted to us for determination. It will, therefore, be necessary to set forth

its provisions quite extensively, for a proper understanding of our discussion of the points involved.

Section 1 provides for holding sessions of the superior court at places other than the county seat, whenever such sessions shall be determined upon the manner in the act provided. Section 2 provides that a majority of the board of county commissioners, whenever they determine it to be to the best interests of the people, shall divide the county into two or more judicial districts, and upon such determination such action shall be submitted to the judge or judges of the superior court for his or their approval and confirmation. Section 3 provides for holding sessions of the court in the designated and approved places whenever business therein shall require. Section 4 provides that, in forming such districts and designating the place for holding court, the board shall be governed by considerations of convenience and economy. Section 5 empowers the board to provide a jail and place for holding court, to be paid for out of the general county fund. Section 6 and 7 provide for the appointment of necessary deputy clerks and deputy sheriffs, who shall reside at the place designated; for the payment of their salaries and furnishing them with necessary supplies and records; the deputy clerk to be provided with a seal, the same as used by the county clerk. Section 8 provides for the duplication of all lienable judgments and decrees, one to be filed in the office of the deputy clerk, and the other, duly certified as a correct copy, shall be transmitted to and filed in the office of the county clerk. Section 9 arranges for the consecutive numbering of the districts, commencing with district No. 1. Section 10 provides for the purpose of determining the proper district any action shall be triable in; that each district shall be considered as a separate and distinct county; and the law applicable to the venue of actions shall apply to each district as if such district constituted a separate and distinct county. Section 11 provides for granting a change of venue from one district to another as from one county to

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another. Section 12 provides that the judgments and orders of the court in any district shall have the same effect throughout the county except that sales shall be made at the court house in the district. Section 13 provides that the only liability for jury duty shall be in the district in which the citizen may reside, and for the purposes of this act each district shall be considered as a separate and distinct county. Section 16 provides for the return of all process issued out of each district court, to be made to the proper district which shall be disclosed in the process, and that the clerk shall style himself as the clerk of the court or county, and not the clerk of any district. Section 17 provides that the style of all actions shall be as now, except that the number of the district shall be added. Section 18 provides for trial of persons charged with crime in the district in which the crime is alleged to have been committed, and for the purpose of determining the venue, each district shall be considered as though it composed a separate and distinct constitutional county. The remaining sections of the act need not be referred to.

The relators claim the act is unconstitutional, in this: (1) That the act restricts the jurisdiction of the superior courts. (2) The creation of a judicial district is a legislative power that cannot be delegated to a board of county commissioners, or to judges of the superior court. (3) The act violates § 4, art. 11, of the constitution providing for a uniform system of county government, by authorizing the creation of unlimited judicial districts. (4) The act violates § 2, art. 14, of the constitution, in authorizing a partial removal of the county seat, without a vote of the people. (5) The act unconstitutionally authorizes the division of counties for judicial purposes. (6) The act violates § 22, art. 1, of the constitution, which guarantees to accused persons the right to have a speedy public trial by a jury of the county.

It is not necessary to discuss each of these several assignments; if the constitutionality of the act cannot be sustained upon any one good reason, it is immaterial in what

other respects, if any, it is in conflict with the constitution. Section 5, art. 4, of the constitution provides that: "There shall be in each of the organized counties of this state a superior court," for which one judge is provided until otherwise directed by the legislature. The plain mandate of this section is one court, with as many sessions as there are judges. It was the apparent intention of the framers of our constitution to make the county the judicial unit for the superior court, leaving, as a matter of proper legislative enactment, the determination of the proper number of judges to be attached to the court in each county. The constitution being a limitation of power, it follows that there is no power vested in the legislature, nor in any board of county commissioners, nor in any judge of any superior court, to divide this constitutional judicial unit into judicial districts, or other territorial limitations less than the county itself. The plain and manifest intendment of this section is that, it being conceded the time would come when by reason of the growth of population and business, one judge could not properly handle the business of the court, such increased business was to be provided for, not by the creation of additional superior courts, but by the creation of additional judges, or, under other constitutional provisions, the creation of additional counties,—one court, with as many judges as might be necessary. The words, "a superior court," as used in the constitution of Connecticut, are held, in *Smith v. Hall*, 71 Conn. 427, 42 Atl. 86, to mean that there shall be one, and only one, tribunal by that name.

Respondents contend that the act does not purport to provide for additional superior courts, but for a holding of the court only in different districts. We cannot so read the act. By its provisions the court in each district is made independent of any other court; its jurisdiction, its procedure, pertains solely to itself; it is dressed in all the statutory paraphernalia of a court; it has its own records for the entry of its orders, judgments, and decrees; it has its own officials, who

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must reside at its situs; it has its own seal, its own jail, its own courthouse; it grants and receives changes of venue from other courts; it has a distinct name and process; it has its own list of trial jurors, its juridical sales are made at its own door; it has a distinctive style for all actions and proceedings over which it assumes jurisdiction.

Under what process of reasoning can it be said that such courts are one and the same court? Can a court have two seals? Can a court grant a change of venue from itself to itself? Can a court have a distinctive title and style of process in one section of a county and a different in another? Can a court enter its orders, judgments, and decrees in records which are not its own records? Will it be contended that a summons requiring a defendant to appear in the superior court of Chehalis county for district No. 1 is fully met, so as not to subject him to a default judgment and the consequent loss of his property, by an appearance within the twenty days in the superior court of Chehalis county for district No. 2? If it is the same court, yes; because a defendant cannot be required to enter his appearance twice in the same action and at two different places. Yet, under the provisions of this act, it is apparent that such an appearance would subject any defendant to a default judgment, because he had not appeared within the time and within the court designated in the summons; he had not appeared in the court in which his action was triable.

Section 10 determines the place of trial of actions in each district as if each district was a separate and distinct county. Section 11 has a similar provision in regard to change of venue from one court to another, and for such purpose each district is constituted a separate and distinct county. If for the purpose of determining the place of trial, and if for the purpose of changing the venue, each district is constituted a separate and distinct county, how can it be said that the courts in which these several actions are triable, and

from which and to which these changes of venue are taken, are not separate and distinct courts? In section 18, for the purpose of the venue of criminal actions, the act attempts to go a step further, in providing that each district shall be considered as though it composed a separate and distinct constitutional county. One might well inquire how it could be that the place where a crime is committed and the place where the accused is triable for the offense is a separate and distinct constitutional county, and yet the court in which he is tried is not a separate and distinct constitutional court. If persons accused of crime are not to be tried in "separate and distinct constitutional" courts, it is to be feared the legislature has labored in vain in giving a criminal code and laws to the people of this state.

The constitution providing that "there shall be in each of the organized counties of this state a superior court" (art. 4, § 5), and the constitution further providing that "no new county shall be established which shall reduce any county to a population less than 4,000, nor shall a new county be formed containing less than 2,000" (art. 11, § 3), it follows that there could be no superior court within any territorial limitation containing a less population than two thousand. Yet, the only limitation governing the commissioners in the establishment of these new courts is "whenever they determine it to be for the best interests of the people of the county." No rules nor prerequisites are given as to how or when this discretion is to be exercised, and under it, should they so determine, they could provide for the establishment of this court in every precinct in the county, with all its attendant paraphernalia of clerks, sheriffs, courthouses, and jails, entailing useless and unnecessary burdens of taxation upon the people; and while this goes more to the wisdom of the act than to its legality, and is therefore a legislative and not a judicial question, it is of the character of reasoning not infrequently discussed by courts in dealing with questions affecting the legality of legislative enactment.

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A good illustration of this may be found in the case of *Lindsley v. Board of Supervisors*, 69 Miss. 815, 11 South. 336, in determining a like question to that before us. Prior to 1859 the legislature of Mississippi passed an act dividing Hinds county into two judicial districts, and providing for the holding of the circuit court in each district, and the drawing of a petit jury from the freeholders of each district. Alfred (a slave) was charged with murder, and upon his trial contended that the jury was not a constitutional jury, in that it was drawn from a district within the county and not from the whole county. The only constitutional provisions bearing upon the point were as follows: "In all proceedings by indictment or information the accused hath a right to a speedy and public trial by an impartial jury of the county where the offense is committed;" and "The right of trial by jury shall remain inviolate." The court held there was no inhibition in either of these two sections against the division of counties into judicial districts and the drawing of jurors from such districts. In 1890 a new constitution was adopted in Mississippi, which made no change in the provisions respecting courts or judicial districts, and the court held in *Lindsley v. Board of Supervisors*, *supra*, that by the adoption of the same provision in the new constitution the construction placed upon it by the court in the *Alfred* case was likewise adopted. But the court adds:

"In the six counties named the spectacle was presented of practically twelve counties in nearly all but names. While each of the six had one name, and one set of county officers, elected by the electors of the county, and was but one for certain purposes, it had two seats of justice, two circuit and chancery courts, two courthouses, two jails, two sets of record books; in fact, it was double as to nearly everything that can be called 'county matters.' All of this came about gradually, step by step, from the seemingly harmless enactment sustained by the decision of *Alfred v. State*. Had the appalling results which have flowed from it been foreseen by the court, it is incredible that it would have made that unfortu-

nate decision, but it was made, and we have the evil results, and had them when the constitution of 1890 was adopted, which contains no word of condemnation or prohibition or restriction of the practice of dividing counties into court districts."

In the above case the act was by the legislature itself, and thus much stronger in its constitutional phases than the act in question, where the legislature attempts not to exercise the power itself, but delegates it to boards of county commissioners.

In Arkansas an act was passed dividing Sebastian county into two judicial districts, one to be styled the "Circuit Court of the County of Sebastian for the Fort Smith district;" the other, "The Circuit Court of the County of Sebastian for the Greenwood district." It was contended the act was unconstitutional, in that it violated that section providing that, "No county now established by law shall ever be reduced by the establishment of any new county or counties to less than six hundred square miles." The court in part thus treats this contention:

"The enactment, under consideration, attempts to divide Sebastian county into two judicial districts, . . . and provides that each 'shall be as independent of, and distinct from each other, and shall hold the same relation to each other as if they were courts of different constitutional counties of this state, and shall be deemed, for all purposes of this act, separate and distinct counties, with original and exclusive jurisdiction within their respective territorial limits.' Thus it will be seen that the legislature is providing for all the attributes of a county, and creating all the essential features of these public corporations . . . the individuality of Sebastian county is entirely destroyed and obliterated. . . . The clerk must keep two offices, one in each district, and all matters of public record pertaining to either must be kept separate and distinct. . . . The objects of this law were to create two separate and distinct districts in Sebastian county, with all the powers and immunities of any constitutional county of the state, the area being less

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than six hundred square miles, which object, if carried out, would destroy the identity of Sebastian county"; *Patterson v. Temple*, 27 Ark. 203;

and the contention of the unconstitutionality of the act was sustained.

We fail to see how the legislature, or any other body, can create a separate and distinct constitutional county, or a district for judicial or other purposes which is to be considered and regarded as a separate and distinct constitutional county, unless it be after first in some way determining that constitutional condition precedent required in the establishment of a "separate and distinct constitutional county." *Farquharson v. Yeargin*, 24 Wash. 549, 64 Pac. 717. Under § 6, art. 4 of the constitution, the superior court has original jurisdiction in all cases in equity, certain enumerated cases at law, all felonies, certain misdemeanors, and other enumerated actions and proceedings, including appellate jurisdiction in cases arising in justice's court in their respective counties. This section, in connection with other sections in the same article, provides a complete system of superior courts, and taken together they form a limitation beyond which the legislature may not go.

"It was the object of the framers of the constitution to mark out a complete judicial system. . . . Such a system cannot be changed by action of the legislative department, except when the power to make the change is conferred by the constitution itself." *Ex parte Cox*, 44 Fla. 537, 33 South. 509, 61 L. R. A. 734.

Neither can the legislature pass an act which in any wise modifies, alters, or changes the jurisdiction of the superior courts of the respective counties, as does this act, by taking away a jurisdiction which, under the general scope and purpose of the constitution, is co-extensive with the county, and substituting a jurisdiction which is controlled or limited to any extent by a geographical division, less than the whole

county. Counsel for respondents admit such to be the law, but they contend, quoting from their brief:

"The act in question does not diminish the jurisdiction of the superior court one iota. There is not a single action or proceeding which under the law was cognizable by a superior court before the passing of this act but what is equally cognizable by that court under the act. The only difference is that the court does not transact all of its business at the county seat, but it may transact part of it elsewhere."

Such argument might be plausible were it not for the provisions of §§ 8, 10, 11, 13, 18, and 21. What jurisdiction does the superior court of Chehalis county for district No. 1 have over the orders, judgments, and decrees, or other instruments, not a lien upon real estate, emanating from the superior court of Chehalis county for district No. 2, which, under the provisions of the act, are to be entered only in the records of district No. 1? Or, if it be claimed that it has such a jurisdiction, then we have the situation, unknown to legal procedure, of a court dividing its original jurisdiction over its own records with another court in which there is no provision for the entry of such a record. The provision of section 10, if it means anything at all, is that the venue of all actions shall be determined as if the district were a separate and distinct county. What jurisdiction, then, has the court in district No. 1 over those actions, the proper venue of which under this provision is in district No. 2? Or, if it be said that the jurisdiction is the same and original in both, why the meaningless provision for a change of venue as from one county to another, as provided for in § 11? What jurisdiction, if any, has the court in district No. 1 over the drawing of jurors in district No. 2, and the use and control of them as attempted to be provided for in § 13? And what is the meaning of § 18, in providing that in all criminal actions the accused shall be tried in the district where the offense was committed, and for that purpose each district shall be considered as a separate and distinct constitutional county?

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Every constitutional county in this state has conferred upon its superior court a certain jurisdiction, and the attempt of this act to consider the district as a separate and distinct constitutional county is nothing less than an attempt to take from the superior court of Chehalis county a jurisdiction which under the constitution it now has, and divide that jurisdiction between the superior court of district No. 1 and the superior court of district No. 2, each district for that purpose being a separate and distinct constitutional county. Both the courts have together the same jurisdiction, both original and appellate, as is now conferred upon the superior court of the county; but under this act, such jurisdiction is divided into as many parts as there may be districts created by the board of county commissioners. Such being the purpose and effect of the act, it is rendered invalid. *Wilson v. Roach*, 4 Cal. 362; *Zander v. Coe*, 5 Cal. 230; *Allen v. Kent Circuit Judge*, 37 Mich. 473; *Flanigan v. Guggenheim Smelting Co.*, 63 N. J. L. 647, 44 Atl. 762.

The litigants of Chehalis county have conferred upon them, under the sections of the constitution above quoted, rights which neither the legislature nor board of county commissioners could take away. They have the right to go into the superior court of Chehalis county for relief, and that right cannot be abridged by compelling them to submit their controversies to any superior court in any territorial district less than the entire county. *Mason v. Ausable Granite Works*, 18 N. Y. Supp. 267.

Having reached the conclusion that the act in question is in conflict with the sections of the constitution above quoted, we do not discuss the remaining contentions of invalidity.

Let the writ issue.

RUDKIN, C. J., PARKER, MOUNT, GOSE, and CROW, JJ.,
concur.

CHADWICK, J. (concurring)—It is provided, in § 5, art. 4, of the constitution:

“There shall be in each of the organized counties of this state a superior court, for which at least one judge shall be elected by the qualified electors of the county at the general state election: . . . In any county where there shall be more than one superior judge, there may be as many sessions of the superior court at the same time as there are judges thereof, and whenever the governor shall direct a superior judge to hold court in any county other than that for which he has been elected, there may be as many sessions of the superior court in said county at the same time as there are judges therein or assigned to duty therein by the governor, and the business of the court shall be so distributed and assigned by law, or, in the absence of legislation therefor, by such rules and orders of court as shall best promote and secure the convenient and expeditious transaction thereof”

In concurring I do not want to be understood as holding that it is not within the power of the legislature to provide that sessions of the superior court can be held at places other than the county seat, when, in the judgment and discretion of the superior judge or of the legislature, it would serve the convenience of the public or result in the prompt and economical administration of justice. Since the time the ancient justices in eyre—*justiciarii in itinere*—were recognized or possibly created by the parliament of Northampton, in 1176, 22 Hen. II, and made their circuit around the Kingdom for the purpose of hearing and determining causes, the fact that the seat of justice or place of holding court is a matter to be resolved by the legislative judgment, based upon considerations of convenience and economy, has been impliedly, if not expressly, recognized. Hence, the question is left open, in most if not all of the states, for the legislature to say where the sessions of the courts of general jurisdiction shall be held. In this state it is provided, Bal. Code, § 4665 (P. C. § 4364):

“The superior courts are courts of record, and shall be always open, except on non-judicial days. They shall hold

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their sessions at the county seats of the several counties, respectively."

Laws permitting courts to be held, or laws establishing courts to be held, at places other than county seats have been frequently upheld, as in no way conflicting with the constitutional provision concerning the location or removal of county seats. *Ellis v. State*, 92 Tenn. 85, 20 S. W. 500; *Whallon v. Gridley*, 51 Mich. 503, 16 N. W. 876; *Johnson v. Fulton*, 121 Ky. 594, 89 S. W. 672; *Cooper v. Mills Co.*, 69 Iowa 350, 28 N. W. 633; *Lyon v. Board of Supervisors*, 100 N. Y. Supp. 676.

Therefore, bearing in mind that an entire act will not be held obnoxious to the constitution, if the court can reject that part which is unconstitutional and still leave a complete act, I have blue pencilled all those parts and sections of the act of 1909 which provide for a division of the court and its territorial jurisdiction into areas less extensive than the constitutional unit, and the establishment of separate courts therein, to see if the act cannot be sustained. It is not certain that enough is left to make it a complete act; but if so, it seems to me that the part remaining would be inconsistent with the legislative intent, which was to make separate and distinct courts as well as jurisdictions. That rule of construction, then, would not apply in aid of the statute, for the rule is applied to preserve the legislative intent rather than to destroy it. In my judgment the legislature has the undoubted right to provide that sessions of the superior courts may be held at places other than the county seat. But under our constitution (art. 4, § 5), the court must remain a judicial entity, albeit sessions may be held for the trial of cases, regularly or upon occasion, at different places. The court, whatever the number of judges, must be the same court and open to all litigants within the county. It was not the intent of the present act to accomplish this, but rather to make two or more separate courts out of one court, with exclusive original jurisdiction in a territory less than the

constitutional unit which is the county itself, and within which there can be but one court, whatever number of departments may be established for the more convenient trial of causes.

I have examined the cases cited by respondents and the statutes which they have assumed to construe, and in none of them do I find anything to sustain the object sought to be attained in the act under review, but they do sustain the principles which I have sought to make plain.

DUNBAR and FULLERTON, JJ., concur with CHADWICK, J.

[No. 7933. Department One. August 3, 1909.]

H. M. GOULD *et al.*, *Appellants*, v. ASA E. WHITE *et al.*,
Respondents.¹

TAXATION—FORECLOSURE—SUMMONS FOR PUBLICATION—SUFFICIENCY. Under Laws 1897, p. 182, § 96, subd. 3, a summons by publication requiring the defendant to appear within sixty days after the "service" of the summons is not in accordance with the statute, and is insufficient to confer jurisdiction to enter a judgment of default.

JUDGMENT—RECITALS OF SERVICE—PRESUMPTIONS—EVIDENCE TO OVERCOME—SUFFICIENCY—BURDEN OF PROOF. In an action to set aside a default tax foreclosure judgment, the presumption of due service of summons, from a recital thereof in the judgment, is overcome, where the defendants prove that they did not appear and were not personally served, and produce the record in the tax case showing nothing beyond the publication of a void summons; and the burden is shifted to the tax title holder to show a valid service of process.

SAME. Where the record shows a judgment entered upon publication of a void summons, testimony of a very general nature tending to show the publication of summons other than the one on file, without showing the time, place, or manner of publication, is not sufficient to sustain the judgment.

TAXATION—REDEMPTION—LACHES—ACTIONS. The neglect of a party to pay taxes for many years does not amount to laches that would bar an action to redeem the property within the statutory period.

¹Reported in 103 Pac. 460.

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SAME—WAIVER OF TENDER. A tender of the tax as a condition precedent to an action to set aside a void tax judgment is not necessary if it was waived.

SAME—ACTION TO REDEEM—DEFENSES. That there was no defense to a tax foreclosure is not bar to an action to set aside a void tax judgment, the statute requiring only a tender of the tax.

EJECTMENT—BETTERMENTS—TAXATION—REDEMPTION—STATUTES. In an action to recover land sold under a void tax judgment, the defendants can recover for improvements made upon the land since the enactment of the betterment law of 1903, but not for those made prior thereto.

Appeal from a judgment of the superior court for King county, Morris, J., entered October 3, 1908, upon findings in favor of the defendants, dismissing an action to set aside tax judgments, after a trial on the merits before the court without a jury. Reversed.

H. H. Eaton (Sullivan & Stevens, of counsel), for appellants.

Willett & Willett, for respondents.

RUDKIN, C. J.—This was a suit in equity to set aside certain tax judgments, and to remove a cloud from the title to the property affected by the judgments. There were four tax cases in all, and two judgments were entered in each case, but the four cases were identical in every respect, except as to the description of the property involved, and a discussion of the facts and law applicable to one case will be decisive as to the others. The original tax judgment entered on the 26th day of April, 1901, contained the following recital:

“This cause coming on regularly for trial this day, and it appearing to the satisfaction of the court that the notice and summons in said cause was regularly and duly served on the above named defendants as the law in such cases requires, and more than sixty days have elapsed since said service and defendants having failed, neglected and refused to appear and contest, or to make any appearance at all in said action or to pay the amount due. . . .”

On the 13th day of May, 1901, the original tax judgment was vacated and set aside, followed by the entry of a second judgment containing similar recitals, with this addition: "That the judgment entered herein on April — was premature, and of no effect, and was entered through mistake."

The complaint in the present action alleged that the defendants in the tax foreclosure proceedings were not served with process and made no appearance in that action, that the only process served upon them was the publication of a notice or summons in the White River Journal citing the defendants to appear "within sixty days after the service of this notice and summons upon you exclusive of the day of service in the above entitled court and defend this action or pay the amount due together with costs." The record in the tax foreclosure proceedings was offered in evidence by the plaintiffs at the trial. That record showed that there was no appearance in the action by the defendants therein named, and that summons was published in the White River Journal, citing the defendants to appear within sixty days after the service of the summons, as alleged in the complaint. The record showed no other service, and the plaintiffs proved that the defendants in the tax proceedings were not personally served, and likewise that all taxes paid by the defendants in the present action had been tendered.

The defendants, on the other hand, offered some testimony of a very general nature tending to show the publication of a summons other and different from that shown by the return on file. The court below found that due and legal service of summons or notice in the tax foreclosure proceedings was made, that a summons was published in that proceeding in addition to the summons shown by the proof of service on file, that no tender of the taxes paid by the defendants had been made, that the parties under whom the plaintiffs claim had abandoned the property and were guilty of laches, that the defendants in the tax foreclosure proceedings had no legal or equitable defense to that proceeding; and entered a judg-

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ment dismissing the action. From that judgment the present appeal is prosecuted.

The summons published in the tax foreclosure, as shown by the proof of service on file, was absolutely void under the decision of this court in *Thompson v. Robbins*, 32 Wash. 149, 72 Pac. 1043, and a score of later cases; there was no appearance by the defendants in that action and no personal service of process upon them; and unless there was some other or further service in the tax proceedings, the court was without jurisdiction there and the judgment is erroneous here. This court has presumed more in favor of the validity of judgments than most courts, but there must be some limit beyond which we may not go, or we might better declare the presumption absolute and incontrovertible. In this case the appellants proved that the defendants in the tax foreclosure proceedings did not appear and were not personally served with process, and produced a record showing nothing beyond the publication of a void summons. This, in our opinion, made out a *prima facie* case in their behalf; the presumption in favor of jurisdiction was overcome, and the burden of proof shifted to the respondents to show that a valid service of process was made. Any other rule would require the appellants to explore every possible avenue through which service might be made, and produce as witnesses the manager or editor of every newspaper or periodical in King county in which a summons might lawfully be published, to prove a mere negative. On the other hand, if there was a valid service of process in that proceeding, it came through the publication of a summons in some newspaper. The time, the place, and the manner of publication was within the knowledge of the respondents or their agents, and it imposes no hardship on them to require them to produce the proofs. 1 Greenleaf, Evidence, § 74. If the burden shifted to the respondents to show a valid service of process, it is very apparent that they utterly failed to establish that fact. As already stated, any service made was necessarily by publication, yet there

is not a scintilla of evidence in the record tending to show the time, place or manner of publication, or the form of the process itself. In other words, the record is entirely barren of evidence tending to show jurisdiction in the court that entered the tax judgment, and the finding of jurisdiction in this case is without testimony to sustain it.

Nor do we find anything in the record to sustain the defense of laches, aside from the fact that the parties under whom the appellants claim neglected to pay their taxes for a good many years. This of itself does not constitute laches in equity, and there is nothing aside from this to bar the appellants from asserting their rights at any time within the period allowed by the statute of limitations, which had not run. The finding that there was no tender of the taxes paid by the respondents is equally unsupported. In our opinion a good and sufficient tender was clearly shown; but in any event, the testimony of the respondents themselves showed a waiver of tender. The finding that there was no defense to the tax foreclosure proceedings is no bar to the present action. We doubt if the general rule requiring a meritorious defense to be shown has any application to actions of this kind. A tender of all taxes paid seems to be the sole requirement of the statute and the respondents may not insist upon more. As said by the court in *Hauswirth v. Sullivan*, 6 Mont. 203, 9 Pac. 798:

"The judgment creditor is permitted to retain the advantage of his judgment for the purpose of securing a just debt, as against a defendant who comes into court and confesses that the debt is just and that he has no defenses thereto. But the rule and the reason for it entirely fail when the defendant comes into court with the money and offers to pay the judgment, as a condition precedent to its being set aside. The advantage of the judgment is only given to the judgment creditor for the purpose of securing a just debt, as against a defendant, who confesses that the debt is just and that he has no defense. But if the defendant brings the money into court and offers to pay the judgment, the reason for permitting the creditor to longer hold the judgment as a

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security for his debt is gone. Payment is a defense, and so is the legal tender of payment."

If the nonpayment of a valid tax, without more, constitutes a bar to an action of this kind, few tax judgments could be set aside, however void or irregular the judgment might be.

This disposes of all questions presented by the record except the question of improvements. The court below found that the respondents made valuable improvements upon the premises, as alleged in their affirmative answers, which fixed the value of such improvements at the sum of \$500. The answer alleged that these improvements, or at least the greater portion of them, were made before the betterment act of March 16, 1903 (Laws of 1903, p. 262), took effect, but the proof tends to show that certain of the improvements were made at a later day. The testimony is very conflicting as to extent and value of the improvements, but we think an allowance of \$250 for all improvements made since the passage of the act in 1903, *supra*, would be extremely liberal in favor of the respondents, and no recovery can be had for improvements made prior to that time. *Investment Co. v. Hambach*, 37 Wash. 629, 80 Pac. 190; *Barton v. Wickizer*, 41 Wash. 293, 83 Pac. 312; *Monk v. Duell*, 41 Wash. 403, 83 Pac. 313.

The judgment is therefore reversed, with directions to enter a decree establishing the rights of the parties pursuant to the provisions of the act of 1903, *supra*, and assessing the value of the improvements in the sum of \$250.

CHADWICK, FULLERTON, and GOSE, JJ., concur.

MORRIS, J., took no part.

[No. 7993. Department Two. August 4, 1909.]

EUGENE M. REARDAN, *Respondent*, v. H. N. COCKRELL *et al.*,
Appellants.¹

BILLS AND NOTES—BONA FIDE PURCHASERS—TRANSFER AFTER MATURITY—EQUITIES BETWEEN INTERMEDIATE HOLDERS. While the innocent purchaser of a note after maturity takes the same subject to equities between the original parties, the rule has no application to, and he is not charged with, equities affecting intermediate holders or indorsers, where there was no illegality in the inception of the note.

SAME—PAYMENTS—NEGLIGENCE OF PAYOR. Where the payors caused a note to be placed in the hands of a third party to be negotiated, and made payments, which through their negligence were not indorsed thereon, to the injury of an innocent third party purchasing the note, the negligent payors must stand the loss.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered August 1, 1908, upon findings in favor of the plaintiff, in an action to foreclose a mortgage. Affirmed.

Happy & Hindman and *James T. Burcham*, for appellants.
Danson & Williams, for respondent.

DUNBAR, J.—This was an action brought by plaintiff to foreclose a mortgage against the defendants. The note and mortgage sued upon were purchased by the plaintiff after maturity of the note. The note and mortgage were given to the Northwestern and Pacific Hypotheek Bank. They were dated August 8, 1901, becoming due in two years thereafter. The defendants in their answer allege, that they had a contract with the Home Co-Operative Company and one W. B. Sullivan, who was connected with said company, that the mortgage should be assigned by the Hypotheek bank to said company, who were to hold it until certain payments agreed upon were made by the appellants to the Home

¹Reported in 103 Pac. 457.

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Co-Operative Company, when the land embraced in the mortgage should be deeded to the defendants; and that certain payments had been made to the Home Co-Operative Company under said agreement that they had not been accredited with. It was alleged that the plaintiff had fraudulently obtained the possession of the note and mortgage by assignment, knowing that such payments had been made. This was denied by reply on the part of the plaintiff; and the court found, and the evidence justified the finding, that the note and mortgage were bought in good faith by the plaintiff, without notice of equities of any kind, and that full face value was given therefor. So that, accepting the findings of the court, which an examination of the record in our judgment sustains, the only question in the case is a purely legal one, viz., whether the plaintiff, purchasing without notice after maturity, is subject to the same defenses as would have been good against his immediate assignor.

It is stoutly maintained by the appellants that the rule of law is well established that one purchasing a chose in action after maturity takes subject to the equities in the case, or to equitable defenses which may be interposed to the claim. This rule is undoubtedly true as applied to equities which existed between the maker and the payee of the note, or as to any inherent disqualifications in the note. But we do not think it applies to cases of innocent purchasers of notes, where there would have been no defense to the action as against the original payee. And in this particular case the mortgage was forwarded to Sullivan, who was acting for the Home Co-Operative Company, and in obedience to a request of Sullivan, with the understanding that it was to be sold to a purchaser to be obtained by Sullivan. This was a long time after the note had become due, and it passed into the hands of the second indorsers by authorization of the payor some two years after its maturity, and without any claim of any frailty in the note, or any defense equitable or otherwise.

On the main proposition in the case, it was said by the supreme court of California, in *Vinton v. Crowe*, 4 Cal. 309, in speaking of a negotiable note taken by the holder after its maturity:

"If the plaintiff obtained the note after its maturity, he took it subject to all subsisting equities between the maker and the payee, but not subject to such as subsisted between the maker and any intermediate holder. Such a doctrine has never been countenanced by any authority whatever, and would make a rule both dangerous and absurd."

While this statement is possibly a little too broad, some cases having been decided the other way, it seems to us that such decisions arise from a misapprehension of the reason of the original rule subjecting the note to defenses that existed between the original maker and payee thereof. But this rule has been uniformly announced by the supreme court of California since, and was reaffirmed in *First Nat. Bank v. Perris Irr. Dist.*, 107 Cal. 55, 40 Pac. 45. Most of the cases reported adversely to this are where there was an illegality in the inception of the instrument, in which case, of course, the pleading of such illegality would be permitted against the innocent holder of the note.

It is said, in 4 Am. & Eng. Ency. Law (2d ed.), p. 315, that:

"According to the English rule, which has been followed by many of the courts of the United States, the holder of negotiable paper which has been transferred to him when overdue is subject to such equities between the original parties as inhere in the instrument itself. As regards matters of defense arising out of collateral transactions, a holder unaffected with actual notice is as free as if he had taken the paper before maturity."

And many cases are cited to support the text, among others *National Bank of Washington v. Texas*, 20 Wall. 72, 22 L. Ed. 295, where Justice Swayne in a concurring opinion says:

"The transferee of overdue negotiable paper takes it liable to all the equities to which it was subject in the hands of the

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payee. But these equities must attach to the paper itself, and not arise from any collateral transaction. A debt due to the maker from the payee at the time of the transfer cannot be set off in a suit by the indorsee of the payee, although it might have been enforced if the suit had been brought by the latter [citing many cases]. The result is the same whether the transfer be made by indorsement or delivery. But the protection of this principle is confined to the maker or obligor. It does not apply as between successive takers. Actual notice is necessary to effect that. There is no adverse presumption. Each one takes the legal title, and his equity is equal to that of his predecessors. "The equities being equal, the law must prevail." The position of the transferee must be at least as favorable as that of the assignee of a chose in action. There the assignee takes subject to the equity residing in the debtor, but not to an equity residing in a third person against the assignor."

Hence, when the company or Sullivan, or whoever it was, took the mortgage from the Hypotheek bank, he took all the interest the bank had in it, and there being no claim that there was any defense whatever as against the bank, it was not subject to defense as against the purchaser. The same rule applies, by the great weight of authority, to the interest of the second purchaser. The supreme court of the United States, in the case just above cited, quoted Chancellor Kent, where it was said by that author, in giving the reason for the rule not applying to the remote indorsers:

"The assignee can always go to the debtor and ascertain what claims he may have against the bond or other chose in action which he is about purchasing from the obligee, but he may not be able with the utmost diligence to ascertain the latent equity of some third person against the obligee. He has not any object to which he can direct his inquiries, and for this reason the assignee, without notice of a chose in action, was preferred in the late case of *Redfearn v. Ferrier et al.*, to that of a third party setting up a secret equity against the assignor. Lord Eldon observed in that case that if this were not so no assignment could be taken with safety."

The principle announced there is applicable to this case. The purchasers could inquire concerning the equities existing

between the Hypotheek bank and the appellants in this case, but could not be expected to trace all collateral agreements that might arise between the payee and many subsequent indorsers or transferees.

In *Hill v. Shields*, 81 N. C. 250, 31 Am. Rep. 499, the court said:

"There is no adverse presumption from the paper being in dishonor as between successive endorsers, as there is between the holder and the maker. Each endorser, including the payee, down the line, has and passes the legal title, and his endorsement in legal import is a contract with his endorsee and all subsequent holders by endorsement, that the maker will pay the note, or on notice he will. . . . It is settled [said the court] in this state, however, that parol testimony may be adduced under a blank endorsement to annex a qualification or special contract as between the immediate parties. . . . But between endorser in blank and remote parties without notice, the weight of authority is that parol proof is inadmissible and the contract implied by law stands absolute;"

citing 2 Parsons, 23; *Hill v. Ely*, 5 Serg. & R. (Pa.) 363, 9 Am. Dec. 376; 1 Daniel, Negotiable Instruments, 699.

"A note payable to bearer, and passed after it is due, does not carry along with it all the equities which may subsist between any intermediate bearer and the maker, it is only subject, in the hands of a bona fide holder, without notice to the equities subsisting between the original parties." *Nixon v. English*, 3 & 4 McCord (S. C.) 323.

To the same effect, *Hooper v. Spicer*, 32 Tenn. 494, and *Favorite v. Lord & Smith*, 35 Ill. 142, which latter is a case in principle identical with the one at bar, and there the court said:

"The defendants here never had any defense against the payees of this note, nor any claim against them of any nature. It is only while the note was in the hands of an intermediate endorser, that any defense existed, and then only as against the endorsers."

"In an action by a third indorsee against the maker of a

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note, the defendant cannot plead a set-off against one of the intermediate indorsers." *Root v. Irwin*, 18 Ill. 147.

It is said in 4 Am. & Eng. Ency. Law (2d ed.), 317, under the heading: "But these defenses must exist at the time of the transfer," that "As in the case of nonnegotiable instruments, no subsequently arising transactions can affect the rights of a holder."

"While there is some conflict of authority in the adjudged cases as to how far a bona fide assignee of nonnegotiable instruments will be bound by latent equities of third persons unconnected with the assignment, the weight of authority strongly leans to the view that he is not to be held subject to such equities." 2 Am. & Eng. Ency. Law (2d ed.), 1081.

Cases are cited from nearly every state in the Union which sustain this announcement. The further citation of accumulated authorities would be unavailing. We think the overwhelming weight of authority is as we have indicated.

The further proposition urged by the respondent, we think would compel the affirmance of this judgment, viz., that the appellants themselves having placed the note and mortgage in possession of Sullivan and the Co-Operative company, for the purpose of permitting them to negotiate the same to third persons, if a loss ensues therefrom, it must be borne by the party who negligently made the loss possible. The ordinary transaction, when a payment is made on a note, is an indorsement on the note of that amount. This indorsement was not made by the party who was acting as agent for the appellants, and if through their negligence the appellants incurred a liability, they are bound by the action of their agent as against an innocent party.

The judgment will be affirmed.

RUDKIN, C. J., CROW, MOUNT, and PARKER, JJ., concur.

[No. 7998. Department Two. August 5, 1909.]

ROBERT H. MORGAN, *Respondent*, v. ROBERT S. MORGAN
et al., *Appellants*.¹

SPECIFIC PERFORMANCE—FRAUDS, STATUTE OF—PART PERFORMANCE—EVIDENCE—SUFFICIENCY. The taking of possession, making part payment, and the making of permanent improvements, entitles a son to specific performance of an agreement by his parents to deed him a tract of land in consideration of his paying off a mortgage thereon, where the contract is clearly established by clear and cogent proof.

Appeal from a judgment of the superior court for Yakima county, Preble, J., entered September 26, 1908, upon findings in favor of the plaintiff, in an action for specific performance. Affirmed.

Fred Parker, Henry H. Wende, and E. B. Cresap, for appellants.

Henry J. Snively, for respondent.

PARKER, J.—This is an action for specific performance of a contract to convey a certain ten-acre tract of land and water rights in connection therewith for the purpose of irrigation thereof. After a trial upon the merits, the superior court made findings of fact and conclusions of law, and rendered its decree accordingly, favorable to plaintiff and respondent and against defendants and appellants; from which determination of the cause this appeal is prosecuted. After a painstaking reading of the evidence, all of which is brought here for review, we conclude that it is sufficient to support the findings of the trial court in all essential particulars, which may be summarized as follows:

The appellants are the parents of the respondent, and hold legal title to the land in controversy, which they acquired, with other adjoining land, under the homestead laws of the United States, by patent issued therefor in 1896.

¹Reported in 103 Pac. 478.

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They are also owners of a water right to irrigate the land in controversy, which is represented by ten shares of the capital stock of the Yakima Valley Canal Company, each share representing the water right to irrigate one acre of land, which water right was acquired by them before the making of the contract sought to be enforced in this action.

In the year 1899 the appellants offered and agreed to give, sell, and convey said land and water right to their son, the respondent, upon the consideration that he pay off the pro rata share of the mortgage upon a certain entire tract of land owned by appellants, including the land in controversy, which pro rata share of the mortgage upon the land in controversy amounted to \$300 and interest.

The respondent accepted this offer of his parents while it was still open for his acceptance, and thereafter went into possession of the land and expended \$150 in improving the same in various ways with a view to making a home for himself thereon. The improvements were of a permanent and substantial character, consisting of excavation for a cellar, and building a permanent stone foundation 30x47 feet, with intent to building a dwelling thereon, also in setting out fruit trees and leveling a yard about such intended dwelling. Respondent also paid appellants the sum of \$100 to be applied in part payment upon the \$300 and interest he was to pay upon the mortgage in consideration of the conveyance of the land to him; all of which was done by respondent after the acceptance by him of the offer of appellants and the making of the agreement with them, and before the commencement of this action, and with full knowledge and acquiescence on the part of appellants. These things were all done by respondent in reliance upon the agreement with his parents, and with intent upon his part to execute and carry the same into effect. No specific time was fixed between the parties within which the \$300 and interest should be paid by respondent, but it was understood that it should be paid whenever he wished to pay the

same before it became due, or thereafter upon demand of appellants or the owner of the mortgage, and respondent offered to pay the same before it became due. This suit was commenced in August, 1902, and prior thereto the respondent offered to fully perform the condition of the agreement, and to pay the balance of the \$300 and interest, but appellants refused to accept the same, repudiated the agreement, and denied any and all obligation thereunder. Respondent was in possession of the land at the time of the commencement of this action in 1902, but has since then been expelled therefrom by appellants.

There is some conflict in the evidence as to the making of the contract and as to the exact time of its making, but that there was a meeting of the minds of the parties we think the learned trial court was fully warranted in finding. The same may be said as to the partial payment of the purchase price and the entering into possession by respondent. The making of the improvements upon the land by the respondent is clearly shown, and also that they were made by him in good faith in reliance upon the parol contract which he seeks to enforce.

The contention of the learned counsel for appellants deals almost exclusively with the alleged insufficiency of the evidence in support of the court's findings and its decree based thereon. In arriving at our conclusion upon the respective rights of the parties to this controversy, we do not overlook any of the argument of counsel, or authorities cited in support thereof, to the effect that the contract must be clearly established, both as to its existence and its terms, that the acts claimed as part performance must be equally clear and certain and must have been done in reliance upon the contract; nor do we lose sight of the fact that this agreement was between parents and son while he was a member of the family, and that the agreement to convey on the part of parents was prompted by influences growing out of that relation as well as by the money consideration, and thus had in

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it some of the elements of a gift as well as a sale, from which fact of relationship counsel argue that the proof should be more clear and cogent than as if the agreement was between strangers. We express no opinion upon the necessity of clearer proof in this case than if it were between strangers, but conceding such to be a correct rule, as some cases (though not of recent date) cited by counsel seem to hold, we think that, viewing all of the facts and circumstances shown by the evidence in this case, the superior court was fully warranted in decreeing a specific performance of the contract. It is not necessary for us to determine whether or not the possession, the part payment of the consideration, or the making of the improvements, each standing alone, would be sufficient to justify the decree, but all taken together, as here shown and found by the court, is sufficient to take the contract out of the statute of frauds, and warrant its enforcement by a court of equity. 26 Am. & Eng. Ency. Law (2d ed.), pp. 54-58; *Mudgett v. Clay*, 5 Wash. 103, 31 Pac. 424; *Horr v. Hollis*, 20 Wash. 424, 55 Pac. 565; *Menger v. Schulz*, 28 Wash. 329, 68 Pac. 875; *Johnson v. Puget Mill Co.*, 28 Wash. 515, 68 Pac. 867; *McKay v. Calderwood*, 37 Wash. 194, 79 Pac. 629; *Jonsland v. Wallace*, 39 Wash. 487, 81 Pac. 1094; *Peterson v. Hicks*, 43 Wash. 412, 86 Pac. 634.

We conclude that the respective rights of the parties were correctly disposed of by the decree of the superior court, and the same is therefore affirmed.

DUNBAR, CROW, GOSE, and MOUNT, JJ., concur.

RUDKIN, C. J., took no part.

[No. 8022. Department Two. August 5, 1909.]

S. R. HUTCHINSON, *Respondent*, v. C. W. WILSON,
Appellant.¹

FORCIBLE ENTRY AND DETAINER—EQUITABLE DEFENSES. In forcible entry and detainer, where defendant admits the lease, default, and notice to quit, equitable defenses, offsets, and counterclaims are not available.

SAME—FRAUD—EFFECT OF ADMITTING COMPLAINT. In forcible entry and detainer, the defendant cannot interpose, as a legal defense, the fact that the lease was void for fraud, entitling him to retain possession until reimbursed for his losses.

SAME—SURRENDER OF PREMISES TO THIRD PERSON. In forcible entry and detainer, the defendant cannot change the action to one of debt by surrendering the premises to a third person after the commencement of the action.

Appeal from a judgment of the superior court for King county, Albertson, J., entered March 5, 1909, in favor of the plaintiff, in an action of unlawful detainer of leased premises, upon sustaining a demurrer to affirmative defenses. Affirmed.

Thomas J. Casey (*Heber McHugh* and *John T. Casey*, of counsel), for appellant.

E. P. Whiting, for respondent.

MOUNT, J.—The respondent brought this action under the statute in unlawful detainer, alleging all the facts necessary, and praying for a restitution of certain leased premises, and for double the amount of rent past due under the terms of a written lease. The complaint was filed on April 14, 1908. On the same day a writ of restitution was issued and served upon the appellant. Thereafter, on April 22, 1908, the writ was executed by the sheriff, and appellant was ousted and the respondent placed in possession of the property. The sheriff made his return to the writ on the next day.

¹Reported in 103 Pac. 474.

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Thereafter a third amended answer was filed, and none of the allegations of the complaint were denied, and were therefore all admitted.

But appellant set out three affirmative defenses, in substance as follows: That the property leased had been used for a lodging house in the city of Seattle, and was furnished as such lodging house; that respondent owned the furniture, which he agreed to sell to appellant for \$3,000; that the lease and the purchase of the furniture were one transaction, and one would not have been made without the other; that respondent falsely and fraudulently represented to appellant that the rooms were all rented to good tenants, and that the monthly income from the lodging house was \$440; that appellant relied upon these representations, and agreed to lease the premises at \$250 per month, payable in advance, and to buy the furniture at the price of \$3,000; that \$2,000 was paid in cash, \$500 of which was to be held by the respondent as a cash bond for the faithful payment of the rent; that the other \$1,500 was applied on the purchase of the furniture, which was subject to a mortgage for the remaining \$1,500; that the income from the property was never \$440 per month or any greater sum than \$150; that said rooms were not rented to good tenants; all of which was known to respondent at the time he made the representations stated; that appellant rescinded the lease and contract immediately after discovering the facts, and tendered to respondent the leased premises and furniture on condition that respondent repay to appellant the \$2,000 paid as aforesaid, which appellant refused.

For a second affirmative defense the answer alleged that respondent was not the owner of the leased premises, but was a lessor thereof under a lease expiring in 1910; that on April 21, 1908, while this action was pending, and while appellant was still in possession, the respondent surrendered the premises to the owner, who accepted the premises and subsequently leased the same to the Thompson Furniture

Company; that appellant on demand surrendered peaceable possession to said Thompson Furniture Company, and now disclaims any right to possession of the premises; that by reason thereof there is now no controversy between appellant and respondent respecting the rights of possession of said premises.

The third affirmative defense is simply a repetition of the allegations of the first two defenses above set out. Appellant in the third defense prays for a counterclaim for damages in the sum of \$2,350. The trial court sustained a demurrer to these affirmative answers, and refused to change the form of the action to one for a debt. The defendant stood upon his answer and refused to plead further. The court thereupon granted judgment against the defendant for \$900, the amount of rent due, but refused to double the rent. The defendant has appealed.

The rule is settled in this state that, in actions of this kind, where the defendant admits the lease and the failure to pay rent after the statutory notice to pay or quit, equitable defenses, offsets, and counterclaims are not available to such defendant. *Ralph v. Lomer*, 3 Wash. 401, 28 Pac. 760; *Phillips v. Port Townsend Lodge*, 8 Wash. 529, 36 Pac. 476; *Owens v. Swanton*, 25 Wash. 112, 64 Pac. 921; *Carmack v. Drum*, 27 Wash. 382, 67 Pac. 808; *Bond v. Chapman*, 34 Wash. 606, 76 Pac. 97; *Morris v. Healy Lumber Co.*, 33 Wash. 451, 74 Pac. 662; *Tipton v. Roberts*, 48 Wash. 391, 93 Pac. 906.

The reason for the rule is stated in *Phillips v. Port Townsend Lodge*, *supra*, as follows:

"The very object the legislature had in view in enacting the statute under which the appellants were proceeding was to afford a summary and adequate remedy for obtaining possession of premises withheld by tenants in violation of the covenants of their lease, and this object would be entirely frustrated if tenants were permitted to interpose every defense usual or permissible in ordinary actions at law. The statute prescribes that a tenant is guilty of unlawful de-

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tainer, after default in the payment of rent pursuant to the lease or agreement under which the property is held, and three days' notice in writing, requiring its payment or possession of the property, shall have been served upon him. Laws 1891, p. 180. And when these facts are made to appear to the satisfaction of the court or jury upon the trial, the landlord is entitled to judgment for restitution of the premises, and also to judgment declaring the forfeiture of such lease or agreement, together with damages and the rent found due. In such proceedings counterclaims and offsets are not available."

While counsel for appellant apparently admit the rule above stated, they seek to distinguish this case by asserting that the defenses here interposed are legal defenses and not equitable defenses. They argue that, because the contract was induced by fraud, it therefore "never became a valid or operative one," and cite *O'Connor v. Lighthizer*, 34 Wash. 152, 75 Pac. 643. However plausible this argument may be, it is clear that appellant cannot hold possession of the premises under the contract and, at the same time, maintain that the contract is void. He must take one position or the other; he cannot take both at the same time. By admitting all of the allegations of the complaint, he admits, that he holds possession under the lease, that he has not paid the rent, and that he has been notified to quit and refused to do so; in short, that he detains possession of the property unlawfully. In the face of these admissions, the writ of restitution was proper, and the appellant cannot be heard to say that the lease is void, it is no lease, and therefore he may retain possession of the property until he is reimbursed for all his losses by reason of entering into the contract. As stated above, the object of the statute was to afford an adequate and summary remedy for obtaining possession of the premises. If the appellant has been wronged or improperly induced to make a contract, his remedy is by an independent action. *Owens v. Swanton*, 25 Wash. 112, 64 Pac. 921. In the cases cited by the appellant, the question here presented

was neither raised nor considered, and it cannot be supposed that we intend to reverse or modify the rule above stated, or to hold that defenses such as these may be interposed in this kind of an action.

Appellant argues that because of the allegations of the second and third affirmative defenses, the controversy as to the right of possession has ceased and the action has become one of debt merely, and all defenses therefore may be interposed. The allegations therein to the effect that the defendant, after the action was begun, peacefully surrendered possession of the premises to the Thompson Furniture Company, and now disclaims any right to possession, do not change the character of the action which was fixed by the refusal to deliver possession prior to the time the action was begun. If appellant had delivered possession upon demand, or in response to the written notice to pay rent or quit, served upon him before the action was begun, the action would then no doubt have been one of debt for rent. But when he refused to deliver possession, and thereby forced the action of unlawful detainer, the character of the action thereby became fixed for all purposes of the case. The return of the writ of restitution shows that it was executed by the sheriff and the respondent placed in possession by virtue of such writ. The fact that respondent thereafter leased or surrendered possession to another could make no possible difference in the case.

There is no error in the record, and the judgment must therefore be affirmed.

RUDKIN, C. J., CROW, DUNBAR, and PARKER, JJ., concur.

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[No. 8100. Department Two. August 5. 1909.]

C. H. PEALER, *Appellant*, v. GRAYS HARBOR BOOM COMPANY
et al., *Respondents*.¹

WATERS AND WATER COURSES—OBSTRUCTION—DAMAGES—JOINT LIABILITY—INSTRUCTIONS. Instructions authorizing a joint judgment against a driving company and a boom company for damages for obstructions causing an overflow of a stream, if the jury found that they were acting in concert, are not objectionable because of evidence tending to show injuries resulting from separate acts, where the jury were told that, if the injuries were caused by one and not the other and they were not acting in concert, they should bring in a verdict against the one that caused the injury.

APPEAL—INSTRUCTIONS—HARMLESS ERROR. Instructions as to the joint liability of a driving company and a boom company are not prejudicially erroneous from the fact that the evidence tended to show liability on the part of one company only, where both companies were owned by the same parties and under the same management.

TRIAL—ADVISORY VERDICT—GRANT OF NEW TRIAL—ERROR OF LAW. Where the question of damages is submitted to a jury in an equity case for an advisory verdict, it is error to grant a new trial for error of law in giving instructions to the jury, where the court is of the opinion that the evidence warranted the verdict.

Appeal from an order of the superior court for Chehalis county, Irwin, J., entered March 13, 1909, upon setting aside an advisory verdict of a jury and granting a new trial for error of law, in an action for an injunction and damages. Reversed.

J. C. Cross (*A. Emerson Cross*, of counsel), for appellant.
Ben Sheeks and *J. B. Bridges*, for respondents.

DUNBAR, J.—This was an action seeking to restrain defendants from overflowing plaintiff's land, and for damages. The prayer for judgment is as follows: (1) Restraining the defendants and each of them from overflowing the land of plaintiff; (2) for the sum of \$1,000 damages

¹Reported in 103 Pac. 451.

herein; (3) for costs and general relief. A jury was impaneled to try out the question of damages, as advisory to the court. The jury returned a verdict in favor of the plaintiff for \$1,000 damages. Upon the return of the verdict, the plaintiff moved for judgment, and the defendants for a new trial. These two motions came on together, and the following order was made by the court:

"This case coming on for hearing on motion of the defendants and each of them for an order setting aside the verdict and granting a new trial, and the same being argued by counsel and the court being fully advised in the premises, it is ordered that the said motion be and the same is hereby granted and the verdict of the jury heretofore rendered herein is hereby vacated and set aside and a new trial granted; the reason for the granting of the new trial being that in the judgment of the court it committed error in the giving of the instructions."

The court does not state what particular instruction it was that he concluded was error; but from the argument of counsel for both respondents and appellant, it is concluded that it was the instruction in relation to the joint liability of the defendants, the respondents here. That portion of the instruction which it is maintained by the respondents was error, and which warranted the court in granting a new trial, was as follows:

"Now if you believe from a preponderance of the evidence that these defendants have been acting in concert, and that in so acting that they have caused the waters in the Humptulips river to overflow his lands and have damaged them thereby, then he would be entitled to recover damages at their hands. Now, as to what constitutes an act in concert would have to be considered by you. If you believe that these two companies are acting for a common purpose in obtaining and securing these logs for rafting, and placing them upon the market, and that that is the common purpose of both these defendants, that would be acting in or for a common purpose, and would be considered as acting in concert although they might be doing different parts of the work, and if the purpose of both of them was the common purpose of getting the

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logs out of the stream to market, then that would be acting in concert, even if they were doing different parts of the work. If they were not so acting, then they would not be acting in concert, and then they would not be charged, or could not be charged jointly, with the damage, if any was done by them. If you find that they were thus acting in concert for a common purpose, and that the acts of both of them contributed to the overflowing of the plaintiff's lands, if it was caused by both of them, then that would be such an act as would make them jointly liable, and your verdict in that case would have to be against both of them for whatever sum you might find. If you find that they were not acting in concert, and that damage was done by one and not the other, if the overflow was caused by one and not the other of the defendants, your verdict should be against one which caused the damage, and not against the other. If you find that they were not acting in concert, and certain portions of the damage or overflow were caused by each one of them, and that they were not acting in concert, then your verdict should be against them separately for the amount you believe each one of them may have caused."

It is a little difficult for us to understand why this was not a correct exposition of the law. But the respondents contend that, as applied to the facts in this case, the instruction in relation to the meaning of concert of action was erroneous and misleading; that the boom is below appellant's lands, and that there was evidence that at the time the logs brought down by natural freshets were jammed in the boom, thus causing the waters to flow back upon and damage appellant's land, without any action on the part of the driving company, and that, again, there is evidence tending to show damage by the driving company alone by sending down logs on artificial freshets when the boom was clear and the boom company free from contributing to such damage or overflow; yet it is said that all the damage caused by these various and distinct propositions were included in the verdict, making one company responsible in damages for a distinct and separate act of the other. We are unable to understand

how this could be true, in the face of the instruction of the court that it was necessary, before the jury could find against the companies jointly, that it must find that the acts of both of them contributed to the overflowing of plaintiff's land. If it was caused by both of them, then that would be such an act as would make them jointly liable. So that the state of affairs which the respondents claim the testimony shows, a question which was submitted to the jury, could not, under the instructions given by the court, have been construed by the jury to constitute a joint liability. The court was particular, after giving the instruction just quoted in regard to joint liability, to further tell the jury that, if they found that these companies were not acting in concert and that damage was done by one and not the other, that if the overflow was caused by one and not the other of the defendants, their verdict should be against the one which caused the damage and not against the other. But, in any event, there is no seeming merit in this contention, for it is alleged in the complaint that the boom company and the driving company are owned by the same parties and are under the same management, and this is not denied by the answer. So that it could make no possible difference to the respondents whether the judgment was not properly divided between the boom company and the driving company. *Mitchell v. Lea Lumber Co.*, 43 Wash. 195, 86 Pac. 405, 9 L. R. A. (N. S.) 900.

This is not the ordinary case of the interference with the discretion of the trial court in granting a new trial, for this is an equity case. The record shows conclusively that it was so understood by both appellant and respondents at the time of the trial, and that it was tried as an equity cause; and it has been uniformly held by this court that a cause will be tried here on the same theory on which it was tried below. The petition for injunction gave the court jurisdiction in equity, and it is a well established rule that, where equitable jurisdiction attaches, equity will hold the cause for all purposes. The verdict of the jury, then, was only advisory to

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the court who tried the cause and advisory to this court, and if this court is of the opinion that the verdict was warranted by the testimony, it would be an idle thing to send the cause back for a retrial. The record in this case is very long, the statement of facts alone comprising some three hundred and fifty pages, and several days were employed in the trial of the cause, and a retrial would entail great expense.

The verdict being sustained by the testimony, the judgment of the court in granting the new trial will be reversed, with instructions to the lower court to grant the motion asked for by the appellant.

RUDKIN, C. J., MOUNT, CROW, and PARKER, JJ., concur.

[No. 7586. Decided August 11, 1909.]

ERNEST NEWCOMB, *Respondent*, v. PUGET SOUND AND QUEEN CITY BOILER WORKS, *Appellant*.¹

MASTER AND SERVANT—INJURY TO SERVANT—UNGUARDED MACHINERY—STARTING MACHINERY WITHOUT WARNING. The evidence is sufficient to sustain a verdict for injuries to a boiler maker's helper from a fall upon an unguarded shaft, where it appears that his superior ordered him into a place of danger near the shaft to assist in making repairs to a belt, promising that the machinery would not be started, and that the starting of the machinery without warning, while he without fault was placing the belt on the pulley, caused him to lose his balance and fall, and there were no guards or supports by which he could save himself.

APPEAL—REVIEW—VERDICT. A verdict will not be disturbed on appeal on account of conflict in the evidence.

Appeal from a judgment of the superior court for King county, Albertson, J., entered January 25, 1908, upon the verdict of a jury rendered in favor of the plaintiff, for injuries sustained by an employee in a factory by reason of an

¹Reported in 103 Pac. 456.

unguarded shaft and the starting of machinery without warning. Affirmed.

Richard S. Eskridge and Hughes, McMicken, Dovell & Ramsey, for appellant.

Kerr & McCord and *L. V. Newcomb*, for respondent.

CROW, J.—Action by Ernest Newcomb against Puget Sound and Queen City Boiler Works, a corporation, to recover damages for personal injuries. From a judgment in his favor, the defendant appeals.

The appellant owns and operates in the city of Seattle a boiler factory, equipped with machinery and other appliances. About twelve feet above the floor, running north and south, and about six feet from the west wall, is a shaft carrying pulleys over which belts pass to machinery below. Upon the particular pulley involved in this action, which is about six feet from the south end of the shaft, are two three-inch belts connecting with a roller machine on the floor below. When not used, the belts are at times removed from the pulley and suspended by ropes from rafters above, one belt hanging north and the other south of the pulley, and the shaft passing through them. About four feet north of the pulley, a pair of two-by-four wooden joists, located at right angles with the shaft, form a support for one of the journal boxes. A few inches further north is a shaft coupling consisting of two flanges secured by bolts exposed on either side. Parallel to, and about eighteen inches east from, the shaft a four-by-twelve inch plank extends north and south. Between the two joists which support the journal boxes and shaft, a diagonal brace extends from the west wall to the rafters above. The plank parallel to the shaft is reached by a ladder at the south end of the building.

The respondent was employed by appellant as a helper to one Harry Souder, a boiler maker. Respondent testified that Souder was about to repair one of the belts above men-

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tioned, being the one north of the pulley; that he ordered respondent up on the plank near the shaft, to untie and place the belt on the pulley so that Souder could measure the length of a splice he was about to make; that the shaft and machinery were then motionless; that Souder promised they should so remain while respondent was on the plank; that respondent, relying on such promise, went on the plank; that while he was engaged in placing the belt on the pulley, the machinery was started; that frayed edges of the belt caught on the shaft and pulled him forward; that the plank had no railing or other support; that, to recover his equilibrium, he reached for the brace to the north; that, failing to catch it, he fell upon the shaft and coupling; that the bolts of the latter caught his clothing, and that he was drawn around the rapidly revolving shaft and injured. Many of these statements were denied by witnesses for the appellant.

The evidence shows that the respondent was required to obey orders of Souder, the boiler maker, although appellant claims Souder had no authority to send respondent near the plank, shaft, or pulley. The evidence further shows that the shaft, coupling, and bolts, were unguarded, and that there was no rail or other support along the plank by which a workman could steady or protect himself. Appellant contends that the trial court erred in denying its motions for judgment at the close of the evidence, for a new trial, and for judgment notwithstanding the verdict. No other assignments are presented. The only question, therefore, is whether the evidence was sufficient to warrant the submission of the case to the jury, and sustain the verdict. In determining this question, we must regard the evidence most favorably to the respondent. Having carefully examined the entire record, we conclude that the cause was properly submitted, and that the verdict must stand.

The appellant's brief shows its positive conviction that the evidence overwhelmingly preponderates in its favor. It con-

tends that no order was given to respondent by Souder; that, under the rules of the factory, no employee, other than three sons of the foreman, were under any circumstances permitted to go on the plank or near the shaft; that the belt respondent claims he was adjusting was not then suspended from the rafters, that it had not been there for some months, and that the machinery had been in motion about five minutes before the respondent was caught and injured. It is undisputed that respondent was on the plank near the shafting, and that he was caught and most severely injured. Appellant utterly fails to account for his presence there, to present any witness who saw him there, or who knows how he happened to be there. Souder denies having sent him there; but the respondent's evidence is corroborated by the fact that he was there, that he was injured, and that no one then present disputes his statement of the manner in which the accident happened.

The appellant's mistake on this appeal is that it fails to appreciate the force of the evidence given by the respondent, which of itself is sufficient to sustain the verdict. The jury were entitled to credit him. They evidently did so, and we are constrained to say that, after a most careful consideration of all the evidence and the surrounding circumstances, we conclude they were amply justified in believing him. His testimony not only appeals to us as a most reasonable explanation of the manner in which the accident occurred, but also seems to be possessed of the elements of truth and credibility. The most that can be said on behalf of appellant is that the evidence was conflicting, the respondent's statement being denied by other witnesses. Appellant in its brief, after stating its version of the situation, the facts of the case, and the accident, says:

"Plaintiff's version of the occurrence is in irreconcilable conflict with the foregoing. He makes no mention of the fact that Souder had been working on the belt, but says that he was directed by Souder to go aloft and untie the belt, which

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he says was tied up by the rope as shown in the photograph, and to place it on the pulley so that Souder might make a measurement to ascertain how much slack he should take out of the belt. It will be borne in mind that several other witnesses had before remarked that this belt had not been tied up since the belt hooks pulled out some four or five months before, but had been hung up or wound up on the machine on the floor of the shop throughout this time. Plaintiff then states that he had untied the belt and was moving it along the shaft towards the pulley, the machinery having been stopped, when the machinery was put in motion and the frayed edges of the belt caught upon the shaft and jerked the plaintiff forward; that in jerking loose from the belt he missed his balance and fell lengthways towards the north upon the coupling three or four feet away, completely missing the diagonal brace before referred to."

This statement itself suggests such a conflict of evidence as to demand a submission of the case to the jury. It was so submitted by clear, comprehensive, and able instructions given by the trial judge, to which the appellant now takes no exception. The jury accepted respondent's version, and its verdict must stand. There is ample evidence to sustain the findings, that respondent's duties required him to be near the shaft and pulley; that he was sent there by Souder, who had authority over him as a vice principal; that by reason of the unexpected starting of the machinery, he was caused to lose his balance; that in attempting to recover himself, he without fault of his own, fell upon the unguarded shafting and coupling, and that the appellant was negligent in starting the machinery while he was in a position of danger, and in having failed to properly safeguard the shaft and coupling. These facts, which appear from respondent's evidence and that of other witnesses, and which must have been found by the jury, sustain the verdict.

The judgment is affirmed.

RUDKIN, C. J., FULLERTON, GOSE, PARKER, MOUNT, and DUNBAR, JJ., concur.

[No. 7983. Department One. August 11, 1909.]

HENRY WICK *et al.*, *Appellants*, v. JOHN A. REA *et al.*,
Respondents.¹

JUDGMENTS — CONCLUSIVENESS — RECITALS — PARTIES BOUND — STRANGERS. The rule that recitals in a judgment are not subject to collateral attack where the court had jurisdiction, and there is nothing in the record to contradict the recitals, has no application as to strangers to the record not parties or privies; hence, where a tax title holder conveyed and warranted the title, his grantee, in an action on the covenant, may show failure of title by reason of defects in the summons.

TAXATION — FORECLOSURE — PROCESS — SUMMONS — DEFECTS. The failure of a summons in a tax foreclosure to properly describe the property, as required by Bal. Code, § 1751, vitiates the tax judgment and sale, as the statute must be strictly pursued to obtain jurisdiction.

COVENANTS—SEIZIN—BREACH. A covenant of ownership in fee simple is one of seizin *in praesenti*, and is broken, if at all, when made.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered December 24, 1908, in favor of the defendants, upon the pleadings, dismissing an action to recover on covenants. Reversed.

J. B. Bridges (*Theo. B. Bruener*, of counsel), for appellants.

Farrell, Kane & Stratton, for respondents.

CHADWICK, J.—Plaintiffs allege that, on September 24, 1906, they purchased of defendants the southeast quarter of section 24, in township 16, north, of range 4, east of Wilamette Meridian, for which they paid the sum of \$5,200. The deed was in form a warranty deed with full covenants. This property had been previously acquired by defendants as purchasers at a tax sale occurring in Thurston county, Washington. This action was brought to recover the value

¹Reported in 103 Pac. 462.

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of a forty-acre tract, a legal subdivision of the southeast quarter as described in the deed, upon the theory that plaintiffs were not the owners thereof and did not have any interest therein subject to conveyance. Judgment is demanded for one-fourth of the full amount paid, or \$1,800. Plaintiffs' right of action is made to depend upon the insufficiency of the summons, which is alleged to be wholly void in that it failed to properly describe the legal subdivisions of the land. The published summons described the land as follows:

- "The northeast quarter of the southeast quarter;
- "Northeast quarter of the southeast quarter;
- "Southeast quarter of the southeast quarter;
- "Southwest quarter of the southeast quarter;
- "All in 24-16-4."

It will be seen that the northeast quarter is described twice, while the northwest quarter is not described at all. It is alleged that this summons is the only summons ever published in the action. This allegation is denied. The judgment in the foreclosure suit recites the following:

"That the plaintiff herein, Thurston County, Washington, is the lawful holder of said certificates of delinquency; that summons and application for a judgment have been served in this proceeding as required by the statutes of the state of Washington, and such statutes complied with in all other respects pertaining thereto;"

the whole case going to the sufficiency of the summons and the effect of the recitals in the judgment. The trial court entertained a motion for judgment on the pleadings interposed by defendants, and rendered judgment against plaintiffs, dismissing their complaint.

The trial court held that, this being a collateral attack upon a judgment in a tax foreclosure proceeding, appellants were concluded by the recitals in the judgment. The rule is, and it has been frequently declared by this court, that where the court has jurisdiction of the subject-matter of an action and the judgment recites due service, when there is nothing

in the record to contradict the recitals of the judgment, it cannot be collaterally attacked. Under this rule the evidence upon which the court based its finding need not appear affirmatively in the record. It is enough if the contrary does not appear. *Rogers v. Müller*, 13 Wash. 82, 42 Pac. 525, 52 Am. St. 20; *Christofferson v. Pfennig*, 16 Wash. 491, 48 Pac. 264; *Kalb v. German Sav. & Loan Soc.*, 25 Wash. 349, 65 Pac. 559, 87 Am. St. 757; *Peyton v. Peyton*, 28 Wash. 278, 68 Pac. 757; *Neordlinger v. Huff*, 31 Wash. 360, 72 Pac. 73; *State ex rel. Boyle v. Superior Court*, 19 Wash. 128, 52 Pac. 1013, 67 Am. St. 724; *Dolan v. Jones*, 37 Wash. 176, 79 Pac. 640; *Nolan v. Arnot*, 36 Wash. 101, 78 Pac. 463; *Bock v. Sanders*, 46 Wash. 462, 90 Pac. 597; *Peterson v. Lara*, 46 Wash. 448, 90 Pac. 596; *Stevens v. Doohen*, 50 Wash. 145, 96 Pac. 1032; *Munch v. McLaren*, 9 Wash. 676, 38 Pac. 205; *Belles v. Müller*, 10 Wash. 259, 38 Pac. 1050; *State ex rel. State Ins. Co. v. Superior Court*, 14 Wash. 203, 44 Pac. 731; *Kizer v. Caulfield*, 17 Wash. 417, 49 Pac. 1064; *Galpin v. Page*, 18 Wall. 350, 21 L. Ed. 959.

The converse of this rule follows, and is sustained by the same authorities. So that, although the judgment recites jurisdiction, if a want of jurisdiction affirmatively appears upon the face of the whole record, the judgment will be held to be void upon collateral as well as direct attack. The trial judge accepted the first proposition as the law of the case; and appellants prosecute this appeal upon the theory that we should now hold that a judgment in the form of that before us should not be held invulnerable against collateral attack, for the two reasons, (1) that there are suggestions in several of the former opinions of this court to the effect that evidence *dehors* the record can be received in all cases to overcome the recitals of the judgment, and (2) the record itself contains evidence of irregular summons which contradicts the recitals of the judgment, thus bringing the case within the second rule quoted.

If the case rested here, we would, without hesitation, affirm

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the judgment of the trial court, for we would be unwilling to hold that the irregular summons appearing in the transcript contradicted the recitals of the judgment. It may exist and the finding of the court be true, for jurisdiction may be acquired by a proper service or voluntary appearance after the publication of a defective summons. But we think this case rests upon a principle entirely different from those upon which the case has thus far proceeded. The rule that judgments of a court of record cannot be called in question in a collateral proceeding is one of necessity. The basic reason for the rule is founded on the consideration that the regular and orderly way of trying the validity of judgments is by an appeal or other appropriate proceeding in the case itself, or under the statute permitting a vacation of judgments for certain enumerated reasons. The reason of the rule shows its limitations. It is confined to parties or privies, and does not apply to strangers. *Griswold v. Stewart*, 4 Cowen 457. Appellants in this case are strangers to the record in the foreclosure proceeding. They were not parties or in privity with a party; and if they have been prejudiced or are injuriously affected by the judgment, the rule is that they can attack it on the ground of want of jurisdiction or, in cases where the facts warrant it, for fraud or collusion. This may be done by plea and proof. 1 Bailey, Jurisdiction, § 233; 2 Freeman, Judgments, 334; 23 Cyc. 1068; *Downs v. Fuller*, 2 Met. 135; *Vose v. Morton*, 4 Cush. 27.

A better statement of the general rule is found in *Sidenspark v. Sidenspark*, 52 Me. 481. On page 489 it is said:

"While it is generally true that an erroneous judgment can only be avoided by writ of error, the books abound in cases where manifest injustice would be done to parties who have no right to reverse a judgment by writ of error, unless they had the right to impeach it collaterally. Hence this rule of law has been so far relaxed in such cases as to allow parties to impeach a judgment by plea and proof, where the court had no jurisdiction, or it had been obtained by fraud or collusion, or erroneously and unlawfully entered up."

We have not overlooked the argument that the omission of the northwest quarter of the southeast quarter of section 4 in the summons is a simple irregularity, and for that reason the judgment is not subject to either direct or collateral attack. While the argument is forceful and is supported by respectable authority, this court is committed to the doctrine that a summons in tax foreclosure proceedings must comply with the statutes. Otherwise the court acts without jurisdiction. The rule, as stated in 17 Ency. Plead. & Prac., 45,

“The right to serve process by publication being of purely statutory creation and in derogation of the common law, the statutes authorizing such service must be strictly pursued in order to confer jurisdiction upon the court,”

was adopted in *Thompson v. Robbins*, 32 Wash. 149, 72 Pac. 1043, and has been followed in the following cases: *Smith v. White*, 32 Wash. 414, 73 Pac. 480; *Dolan v. Jones*, 37 Wash. 176, 79 Pac. 640; *Woodham v. Anderson*, 32 Wash. 500, 73 Pac. 536; *Williams v. Pittock*, 35 Wash. 271, 77 Pac. 385; *Young v. Droz*, 38 Wash. 648, 80 Pac. 810; *Owen v. Owen*, 41 Wash. 642, 84 Pac. 606; *Bartels v. Christenson*, 46 Wash. 478, 90 Pac. 658; *Bauer v. Widholm*, 49 Wash. 310, 95 Pac. 277; *Gould v. Knox*, 53 Wash. 248, 101 Pac. 886; *Hays v. Peavey*, ante p. 78, 102 Pac. 889; *Gould v. Stanton*, ante p. 363, 103 Pac. 459; *Gould v. White*, ante p. 394, 103 Pac. 460. The statute, Bal. Code, § 1751 (P. C. § 8692), provides that the notice or summons shall name the lands or premises against which judgments will be rendered. The case falls, therefore, within the rule of the cases just cited.

It is also contended that appellants have no right in any event to maintain their action, because none of the covenants of the deed have been broken. In other words, they have not been put to the defense of their title or ousted because of its infirmity. It was held in the following cases that a covenant of ownership in fee simple is a covenant of seizin, and one *in praesenti*, which is broken, if at all, when made. *Tingley v. Fairhaven Land Co.*, 9 Wash. 34, 36 Pac. 1098;

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Decker v. Schulze, 11 Wash. 47, 39 Pac. 261, 48 Am. St. 858, 27 L. R. A. 335. We have reached our conclusion in this case upon grounds somewhat different from those urged and met by counsel in their arguments, and upon grounds that were in all probability not presented to or considered by the trial court. But we conceive our present holding to be the law of the case, and therefore declare it to be so.

The judgment of the lower court is reversed, and the cause remanded with instructions to take evidence upon the issues made by the pleadings.

RUDDIN, C. J., GOSE, FULLERTON, and MORRIS, JJ., concur.

[No. 8059. Department One. August 11, 1909.]

PHILIP MILLER *et al.*, Respondents, v. PETER WHEELER,
Junior, as Administrator *etc.*, *et al.*, Appellants.¹

WATERS—IRRIGATION—APPROPRIATION—AUGMENTED FLOW—PERCOLATION FROM ARTIFICIAL SWAMPS. Waters appropriated from another watershed for irrigation, and discharged upon the owner's land, forming swamps and accumulations which percolate to and artificially augment the waters of another stream, may be impounded and used by the appropriators as their property, before it leaves their lands, as against a prior appropriator on the augmented stream.

SAME—ABANDONMENT—INTENT—EVIDENCE—SUFFICIENCY. In such a case, intent to abandon such surplus waters is not shown by the fact that the surplus was allowed to run into a natural waterway, when it appears that contracts were made with reference to the use of the accumulated waters after the swamps developed, and the water was actually used for eleven years, and made the subject of conveyance.

SAME—ARTIFICIAL FLOW CONVEYED BY NATURAL WATER COURSE. Waters appropriated from another watershed for irrigation may be turned into and conveyed by a natural water course without becoming subject to the use of others, and is not lost to the appropriators by reason of the loss of identity.

¹Reported in 103 Pac. 641.

SAME—SPRINGS—STATUTES—CONSTRUCTION. Bal. Code, § 4114, providing that a person upon whose lands seepage or spring water first arises shall have the prior right to its use, if capable of being used thereon, has no application to fountain heads of water courses which have been appropriated by others.

SAME—SURPLUS WATERS—PERMISSIVE USE—PRESCRIPTION. A permissive use of the surplus of appropriated waters will not ripen into rights by prescription, or under the statute of limitations, as the use must be adverse.

SAME—RECAPTURE OF WATERS TURNED INTO STREAM—AMOUNT. Where impounded waters were allowed to flow off the owner's land into a water course with intent to recapture it below, no more can be taken out than was allowed to flow in, as against prior appropriation of the flow of the stream, after making due allowance for waste.

SAME—INTERFERENCE WITH TRIBUTARIES. In such a case, in reclaiming the impounded water, the owner cannot cut off any original sources or tributary springs so as to diminish the perennial flow already appropriated.

Appeal from a judgment of the superior court for Chelan county, Steiner, J., entered January 7, 1908, dismissing an action for an injunction respecting waters used for irrigation, after a trial on the merits before the court without a jury. Reversed.

Reeves & Reeves, for appellants.

Higgins, Hall & Halverstadt and *Thomas & Sorenson*, for respondents.

CHADWICK, J.—In 1874 Philip Miller settled upon a tract of land now in Chelan county, Washington. At the time, a prior settler, whose improvements he bought, had appropriated and diverted about one hundred miner's inches of water, then flowing in the Quil-toc-chin, latterly called the Squillchuck, a small stream flowing out of the mountains across the Wenatchee valley and into the Columbia river. Thereafter, before the intervention of other rights, he dug a larger ditch, and appropriated and put to beneficial use three hundred and twenty miner's inches, measured under six-inch pressure.

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In the summer of 1885, Peter Wheeler and Fletcher Byrd settled on what is now known as Wheeler hill, their lands lying above the point of Miller's head gate and distant about a quarter of a mile from the Squillchuck. On the Wheeler land there were two small springs, and on the Byrd land there was a larger spring. These springs were so located that they furnished no water for irrigation for the owners of the land upon which they arose. The Wheeler and Byrd land, or part of it, formed a natural basin culminating in a narrow gulch descending rapidly into the Squillchuck; and in the springtime, as the snow was melting, water flowed from this drainage basin into the gulch and down into the Squillchuck. The testimony is in sharp conflict as to the amount of water flowing from the springs at the time Wheeler and Byrd made settlement, the witnesses for plaintiffs fixing the flow from them at from four or five inches to eight or ten inches in the summer season; while the witnesses for defendants insist that no water whatever, other than the flood waters of spring flowed from the springs into the Squillchuck.

In the year 1887, Wheeler, Byrd and others went above their lands and onto another watershed, and appropriated the waters of Stemilt creek, which they brought over and used for irrigating their lands. From this time the flow of the springs gradually increased, and marshes of considerable extent formed on the lands, an acre or two on both the Wheeler land and the Byrd place. The marshes formed by the excess waters from the Stemilt were like the springs, so situate that neither owner could collect the waters there accumulating and put them to a beneficial use on his own land. About the year 1894, it was agreed between Wheeler and Byrd that Byrd might lay a ditch so as to drain the excess waters on the Wheeler lands and divert the water to his land adjoining for the purpose of irrigation, and that in consideration therefor Wheeler might have the flow of the Byrd spring and seepage from the marsh after it had passed down the gulch, into the Squillchuck, and on past the Miller

head gates, for use on lands owned by him lower down in the valley.

In the year 1901, C. E. Morse bought the land and water right of Fletcher Byrd. That Wheeler and his grantees used water out of the Squillchuck, sold land and conveyed water rights, from 1895 up to 1906, seems not to be denied. In July, 1906, however, the flow at Miller's head gate being less than three hundred and twenty inches, he brought his action to restrain defendants from all acts and uses of the water that tended to decrease his flow below the amount to which he was entitled under his original appropriation. The gist of the complaint is contained in the following excerpt from the pleadings:

"That since about the 1st day of July, 1906, the quantity of water flowing in said stream and coming down to the head-gate of said ditch which is located in section twenty-two (22) township twenty-one (21) range twenty (20) E. W. M. and has been so located since the year 1870, has been less than said three hundred and twenty inches since which time the defendants have taken and diverted, and are continuing to take and divert from said stream, above said head gate about twenty inches of water miner's measure under a six inch pressure, and have prevented its returning to said stream, and have wrongfully deprived the plaintiffs thereof, said water so taken and diverted being water arising from springs located upon or near section three (3) township twenty-one (21) range twenty (20) E. W. M. which are and were, at the time plaintiffs' right to take said waters became vested, feeders of said main stream and a part of plaintiff's said water."

There is no evidence whatever tending to show that any diversion of water has been made by any of the appellants from the Squillchuck itself above Miller's head gate. Hence, we conclude that the diversion complained of is the digging of the ditch which drained the marsh and spring on the Wheeler land, with the incidental right claimed by the Wheelers and their grantors to divert the overflow of the Byrd spring and marsh, after it had followed the natural path of

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gravitation into the Squillchuck. Confusion may be the worse confounded, however, for appellants say in their brief that respondents are seeking to restrain a diversion *below* the Miller head gate. No findings of fact were made by the trial court, but we think the evidence shows that the greater part of the water now flowing down the gulch into the Squillchuck from Wheeler hill is due to the seepage from the Stemilt waters which have been turned on the lands of appellants. The question naturally occurs whether the water from this artificial source, having naturally gravitated into the soil and percolating therein, may be ditched and drained for further use by the owners as against the right of a lower appropriator; in other words, whether percolating waters arising from an artificial source become a natural flow of an existing watershed and a part of its drainage stream. Our conclusion is that it may be or may not be so, according to the facts presented in the particular case under consideration. The Stemilt waters being the result of the landowners' energy and effort, it would seem but just to say that, so long as he used them or could impound the overflow or waste upon his own land although for use on other land, one asserting a right of appropriation in no way dependent upon the artificial flow, but made without reference to it, should have no cause to complain. The doctrine of appropriation rests upon the theory of ownership, and while cases going to the particular question here presented are not numerous, there are nevertheless some that in principle sustain the premises which we have laid down.

In Farnham on Waters, § 672d, the rule is stated thus:

"When an appropriation is made of the water of a stream, the rights of the appropriator are limited to the natural condition of the stream at the time the appropriation is made, and he has no interest in the improvements subsequently made which increase the supply of water flowing in it. Therefore, if by his own exertions another increases the available supply of water in the stream, he has a right to appropriate

and use it to the extent of the increase. This rule does not apply to mere removal of obstructions or hastening of flow, so that the actual amount of water which passes along the stream is not increased, but only to cases in which a supply of water is added to the stream which would not otherwise have flowed there."

If this be the rule applying to waters of the stream actually appropriated, the conclusion is inevitable that it would apply with greater force to a supply of water brought from an entirely different source and from another watershed. We find the principle underlying the rule quoted in *Burnett v. Whitesides*, 15 Cal. 35, where the rights of the first appropriator were limited to the natural waters of the stream. In *Platte Valley Irr. Co. v. Buckers Irr. etc. Co.*, 25 Colo. 77, 53 Pac. 334, it was held that one who had increased the average continuous flow of a stream by his own energy and expenditure was entitled to such increase, but would not be entitled to the original flow as against the senior appropriator. In *Herriman Irr. Co. v. Butterfield Min. & Mill Co.*, 19 Utah 453, 57 Pac. 537, the court, acknowledging the principle of ownership in waters developed in excess of the natural flow, says:

"We are clearly of the opinion that the defendant company did not acquire a right to any of the water flowing from said tunnels except such as was developed by percolation, and that the plaintiff retains the right to all the water flowing in the natural channel of Butterfield Creek, diminished only to the extent of the increase of the quantity of water which naturally flowed in the channel of Butterfield Creek, before said tunnels were run, and said springs were dried up."

While the waters of Stemilt creek, when discharged upon the Wheeler and Morse lands, and after their use for irrigation, did not become percolating waters in the full sense—for as we understand the term it rests upon the theory of unknown source—the rights to it while still upon the lands of the owners can be sustained by the same reasoning which under the common law gave a landowner a right to impound

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for his own use the water percolating through his own soil. To take it was ever held to be *damnum absque injuria* to another, for it was a component part of the soil. This proposition is too well established to require the citation of authority.

Ownership implies responsibility. If our reasoning requires further support, the fact that the appellants, Wheeler and Morse, because of the artificial augmentation of the natural flow of the Squillchuck, would be held liable for all damage done to the lower appropriators from flooding their lands, injuring the banks of the stream, or washing out their improvements, needs only to be mentioned to meet approval. Respondents' rights must be measured by the condition of the stream at the time of Miller's appropriation in 1874. If his appropriation was subsequent to the development of the Stemilt water, an entirely different question would be presented. If the natural flow of the Squillchuck increases, it is his gain; if diminished from natural causes, it is his loss. He has no interest in an increased flow arising from an independent source, unless abandoned by its owner.

Upon the principle that the law of appropriation as applied to the arid regions will not tolerate a waste of water, it has been held that water that is allowed to run to waste after use on the land of the appropriator is abandoned and that lower appropriators are entitled to the surplus. Farnham, Waters, 694; *Power v. Switzer*, 21 Mont. 523, 55 Pac. 32; *Roeder v. Stein*, 23 Nev. 92, 42 Pac. 867; *Barrows v. Fox*, 98 Cal. 63, 32 Pac. 811. But, abandonment like appropriation is a question of intent, and to be determined with reference to the conduct of the parties. The intent to abandon and an actual relinquishment must concur, for courts will not lightly decree an abandonment of a property so valuable as that of water in an irrigated region. Farnham, Waters, 691. In the instant case, when the marshes developed upon the lands of Wheeler and Morse, but at the place where the waters therein could not be used by the respective owners on their own lands, there is evidence showing that Wheeler agreed

that Byrd might drain the surplus on his land in consideration of the use of the surplus flowing from the Byrd land, through the natural waterways, including the Squillchuck, upon his land down in the valley and below respondents' head gate. This contract was in itself a circumstance tending to show that it was not the intention of the parties who had developed a supply of water and carried it over from the Stemilt to abandon its use. But the fact that the water was actually so used for a beneficial purpose for a period of eleven years, and made the subject of conveyance, seems to us conclusive upon this feature of the case. The fact that the surplus is allowed to run into a natural waterway to which rights of appropriation have attached is a circumstance to be considered, but does not shift the burden of proving an abandonment from respondents. *Hall v. Lincoln*, 10 Colo. App. 360, 50 Pac. 1047.

Respondents invoke the general rule that waters draining into and augmenting the natural flow of the stream and its tributaries become a part of the natural flow of the stream, and hence the property of the prior appropriator. This raises the question whether the bed of the tributary gulch and the Squillchuck itself can be used as a ditch to convey the surplus Stemilt waters from Wheeler hill to the Wheeler lands below the Miller head gate. The law of appropriation is the creature of necessity. It is a growth peculiar to conditions unknown to the common law. It has followed custom rather than fixed conditions, and it was held in the earlier case of *Hoffman v. Stone*, 7 Cal. 46, that the immense cost and waste involved in conveying water to its place of use justified the owner in taking advantage of the natural beds and channels of streams when it could be done without injury to the rights of others. In that case the court said:

"It would be a harsh rule, however, to require those engaged in these enterprises to construct an actual ditch along

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the whole route through which the waters were carried, and to refuse them the economy that nature occasionally afforded in the shape of a dry ravine, gulch, or canyon."

This rule was extended in the case of *Butte Canal & Ditch Co. v. Vaughn*, 11 Cal. 143, wherein Mr. Justice Field, who has so ably and clearly differentiated the law of appropriation from the rules of the common law, said:

"It does not necessarily follow that the water introduced by the defendants became subject to the use of the plaintiffs, because its identity was lost by being mingled with the water naturally flowing in the creek. The rights of the parties, after such mingling, are not unlike the rights of the owners of goods of equal value after their mixture—both are entitled to take their given quantity."

This doctrine is affirmed in the following cases: *Parks Canal & Min. Co. v. Hoyt*, 57 Cal. 44; *Creighton v. Kaweah etc. Irr. Co.*, 67 Cal. 221, 7 Pac. 658; *Paige v. Rocky Ford Canal & Irr. Co.*, 83 Cal. 84, 21 Pac. 1102, 23 Pac. 875; *Malad Valley Irr. Co. v. Campbell*, 2 Idaho 411, 18 Pac. 52; *Herriman Irr. Co. v. Butterfield Min. etc. Co.*, 19 Utah 453, 57 Pac. 537; *Platte Valley Irr. Co. v. Buckers Irr. etc. Co.*, 25 Colo. 77, 53 Pac. 334; *Simmons v. Winters*, 21 Ore. 35, 27 Pac. 7; Kinney, Irrigation, § 246.

Appellants also rely upon Bal. Code, § 4114 (P. C. § 5829), which provides that the person upon whose lands the seepage or spring water first rises shall have a prior right to such waters, if capable of being used upon his lands. A review of the authorities will show that a clear distinction is drawn between springs rising or seeping upon lands and from which there is no outlet, and springs which form the fountain heads of living water courses. The court below has found (otherwise its decree could not be sustained) that there was a living flow from these springs. They thus became a part of the Squillchuck waters, and therefore subject to appropriation. This court has said that, if the statute were given any other effect it would be held unconstitutional.

Nielson v. Sponer, 46 Wash. 14, 89 Pac. 155, 123 Am. St. 910.

Nor do we think that any right can be predicated by the Wheelers and their grantees to use water on the valley lands by reliance upon the statute of limitations or rights acquired by prescription. Rights in water come from adverse use rather than a permissive use, and so long as there was an excess of water flowing past the Miller head gate, no right could accrue to the users of that surplus. It must not be inferred from what has been said that the rights of appellants are not without some qualifications, as will be seen from a perusal of the authorities cited. Having decided that appellants did not intend to, and did not in fact, abandon the Stemilt water impounded on or flowing off of their lands on Wheeler hill, but that it was allowed to flow with intent to recapture it at a point below, it follows that its identity must be preserved. Identity in this particular is made possible by measurement. They can take no more out than they put in, making due allowance for natural waste and loss by evaporation. *Burnett v. Whitesides*, *supra*; *Wilcox v. Hausch*, 64 Cal. 461, 3 Pac. 108.

Another limitation, as will be noted in the authorities, is that in reclaiming their own they cannot cut off nor dry up any of the original sources and springs tributary to the Squillchuck, the waters of which have been appropriated by respondents and the perennial flow of which they are entitled to. The testimony shows that there was a perennial flow of water from the springs on Wheeler hill. The evidence as to the amount of this flow is so conflicting that we cannot definitely fix it. Having decided that there was some flow, that this was increased by the energy and expenditure of appellants, that the increase was not abandoned, the case will be remanded to the lower court to find the amount of the original flow from the springs on Wheeler hill, the amount this flow has been increased by artificial means, and the amount of depreciation from natural waste and evaporation

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Citations of Counsel.

of the added flow in passing from Wheeler hill to the Miller head gate; and that it then decree that the amount so found be allowed to pass the head gate for use on the lands of Wheeler and his grantees in the valley below. To accomplish this end, the trial court may take such additional testimony as may be necessary.

RUDKIN, C. J., FULLERTON, GOSE, and MORRIS, JJ., concur.

[No. 7788. Decided August 12, 1909.]

J. A. MOLLER, *Administrator etc.*, *Appellant*, v. NIAGARA FIRE INSURANCE COMPANY, *Respondent*.¹

INSURANCE—POLICY—TRANSFER OF INTEREST—EXECUTORS AND ADMINISTRATORS—SALES—CONFIRMATION—TIME WHEN INTEREST PASSES. An administrator's sale for cash, confirmed by the court, transfers the equitable title to the purchaser, although the deed is not delivered and no part of the purchase price is paid, Bal. Code, § 6274, providing that the sale shall be valid "from the time" of the confirmation; and hence a fire insurance policy providing that the policy shall be void if any change take place in the interest, title, or possession of the subject of the insurance, is vitiated by such sale and confirmation (FULLERTON, J., dissenting).

SAME—WAIVER BY AGENT. A provision in a fire insurance policy rendering it void upon any transfer of interest cannot be waived by an agent where the change in interest occurred after issuance of the policy.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered July 6, 1908, upon findings in favor of the defendant, in an action on a fire insurance policy, after a trial before the court without a jury. Affirmed.

John C. Hogan, for appellant, cited: 19 Ency. Plead & Prac. 917; *Greenough v. Small*, 137 Pa. St. 132, 20 Atl. 553, 21 Am. St. 859; *Wood v. American Fire Ins. Co.*, 149

¹Reported in 103 Pac. 449.

N. Y. 382, 44 N. E. 80, 52 Am. St. 733; *Hammel v. Queens Ins. Co.*, 54 Wis. 72, 11 N. W. 349, 41 Am. Rep. 1; *Greenlee v. North British & Mercantile Ins. Co.*, 102 Iowa 427, 71 N. W. 534, 63 Am. St. 455; *Loy v. Home Ins. Co.*, 24 Minn. 315, 31 Am. Rep. 346; *Leshey v. Gardner*, 3 Watts & Serg. (Pa.) 314, 38 Am. Dec. 764; *Ayres v. Hartford Fire Ins. Co.*, 17 Iowa 176, 85 Am. Dec. 553; *Sun Fire Office v. Clark*, 53 Ohio St. 414, 42 N. E. 248, 38 L. R. A. 562; *Arkansas Fire Ins. Co. v. Wilson*, 67 Ark. 553, 55 S. W. 933, 77 Am. St. 129, 48 L. R. A. 510; *Franklin Ins. Co. v. Feist*, 31 Ind. App. 390, 68 N. E. 188; *Erb v. German American Ins. Co.*, 98 Iowa 606, 67 N. W. 583, 40 L. R. A. 845; *Home Mut. Ins. Co. v. Tomkies & Co.*, 96 Tex. 187, 71 S. W. 812, 814; *Garner v. Milwaukee Mechanics' Ins. Co.*, 73 Kan. 127, 84 Pac. 717, 117 Am. St. 460, 4 L. R. A. (N. S.) 654.

Granger & Magill, for respondent.

Crow, J.—Action by J. A. Moller, administrator of the estate of Eli Anderson, deceased, against Niagara Fire Insurance Company, a corporation, on an insurance policy to recover loss sustained by fire. From a judgment in favor of defendant, the plaintiff has appealed.

The appellant contends that the trial court erred, (1) in entering judgment in favor of the respondent; (2) in refusing to enter judgment in appellant's favor; and (3) in failing to make findings requested. Only one of several defenses interposed by the respondent is now before us for consideration, all others having been waived at the trial. The policy, issued to appellant July 1, 1904, contained the following clause:

"This entire policy, unless otherwise provided by agreement, endorsed hereon, or added hereto, shall be void . . . if any change, other than by the death of the insured, take place in the interest, title or possession of the subject of insurance, . . . whether by legal process or judgment or by voluntary act of the insured, or otherwise, . . ."

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The material facts, shown by the evidence and found by the trial court, are, that the insured property, which was located in Pacific county, belonged to the estate of the deceased; that its principal value consisted of improvements protected by the policy; that on June 2, 1904, and August 3, 1904, in probate proceedings regularly conducted, the superior court of Pacific county entered orders in the matter of the estate of Eli Anderson, deceased, authorizing and directing the appellant as administrator, to sell real estate, including property covered by the policy, for the payment of debts, the sale to be for cash; that on August 26, 1904, he sold the property here involved to one Fred Reif, for \$600 cash; that on September 3, 1904, the sale was confirmed by order of court, and the appellant was directed to execute and deliver an administrator's deed; that on September 12, 1904, after entry of the order of confirmation, the buildings upon the property so sold, and which were covered by the policy of insurance, were destroyed by fire; that no administrator's deed has been delivered to Fred Reif, and that he has not paid the purchase money.

The appellant contends that the policy was in effect at the date of the fire, and that no change in interest, title, or possession had occurred sufficient to avoid it, no deed having passed to the vendee, and the purchase price not having been paid. In support of this contention he cites numerous authorities which are not pertinent to the facts in this action. They are decisions which either construe clauses in policies different from the one now before us, or involve execution or other judicial sales in which the insured continued to hold title to the property or the possession thereof, or was entitled to redeem from such sale within a fixed statutory period. For instance, in *Wood v. American Fire Ins. Co.*, 149 N. Y. 382, 44 N. E. 80, 52 Am. St. 733, cited by appellant, it appears that about ten days before the fire the real estate which was the subject of the insurance was sold by the sheriff under execution. The court, construing the identical for-

feiture clause we now have under consideration, held the insured was entitled to recover on the policy, but in announcing its reasons for so holding said:

"The effect of a sale of real estate upon execution is declared by statute, and no other effect can be given to it. The judgment debtor, or his assignee, or his creditors, may redeem the same within fifteen months thereafter, and the right and title of the judgment debtor is not divested by the sale until the expiration of the period for redemption: (Code C. P. § 1440.) During that time the debtor is entitled to the possession and use of the rents and profits. At the time, therefore, that the property in question was destroyed by fire, the interest, title, or possession of the insured had not been changed. The statute had operated to postpone the effect of the sale upon the interest, title, or possession of the owners until the expiration of the period for redemption."

The doctrine announced by this court in *Browne Nat. Bank v. Southern Ins. Co.*, 22 Wash. 379, 60 Pac. 1123, is on principle in harmony with the New York case, but no redemption from an administrator's sale is granted by the statutes of this state which can have the effect of preventing the immediate passing of either the legal or equitable title to the vendee.

The respondent contends that the sale so changed appellant's interest and title as to avoid the policy and relieve it from liability thereon. The controlling questions before us are, whether the estate, of which the appellant was administrator, continued to hold the equitable title, and whether appellant was, after confirmation, entitled to tender a deed to the vendee, and demand payment of the purchase money irrespective of the loss of the building. If the purchaser was then liable, or if in other words, a specific performance of the judicial contract of sale could be obtained compelling him to accept the legal title and make payment, there must have been such a change in the equitable title as would avoid the policy.

Bal. Code, § 6265 (P. C. § 2573), provides that the court

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may order an administrator's sale for cash, or on credit not exceeding six months. This sale was ordered to be made for cash, and it may be seriously questioned whether the appellant should have accepted the bid, have reported the sale, or have obtained an order of confirmation without first collecting the purchase price. Without regard to this question, we hold, upon the record before us, that the equitable title passed to the vendee Reif, and that after confirmation the appellant may tender him a deed and collect the entire purchase price, notwithstanding the loss by fire. The probate proceedings were in all respects regular and valid. The sale had been legally conducted and confirmed. No further order of the court was necessary to transfer the legal title. It was appellant's duty to perform the ministerial act of executing and delivering the deed. No report to the court, of the performance of that act, was necessary. The equitable title passed when the sale was confirmed, and the appellant was not only entitled to receive the purchase money, but should have previously collected the same. The sale is one that can be specifically enforced against the purchaser Reif. Mr. Pomeroy, at § 316, of his work on Specific Performance of Contracts (2d ed.), says:

"Whether a failure or defect or depreciation of the subject-matter, or any other similar extrinsic event, beyond the control of either party—that is, happening without the agency or default of a party—shall affect the right to a specific performance, depends, as a general rule, upon the time when it took place with reference to the conclusion of the contract; or, in other words, upon the fact of its taking place *before* or *after* the contract was finally concluded so that the equitable estate would thereby pass to the vendee. It is necessary, therefore, to determine with precision, in the first place, the exact time when an agreement is regarded in equity as concluded."

In § 318, speaking of judicial sales, he further says:

"The rule which seems to be sustained by the weight of authority, pronounces the rights and estate of the parties

to be settled at the date of the sale, subject, of course, to be defeated by an order for opening the bids and reselling the subject-matter; the confirmation thus relates back to that time. According to some authorities, or at least *dicta*, the time at which the equitable interests of the parties are established, and when the purchaser is to be considered as owner of the estate, is the date of the order confirming the order of sale, or of whatever other judicial act the practice substitutes in place of such order."

Bal. Code, § 6274 (P. C. § 2582), reads as follows:

"If it appear to the court that the sale was legally made and fairly conducted, and that the sum bidden was not disproportionate to the value of the property sold, or if disproportionate, that a greater sum, as above specified, cannot be obtained, the court shall make an order confirming the sale and directing conveyances to be executed; and such sale, from that time, shall be confirmed and valid."

The words "from that time" evidently refer to the time of confirmation, and under this section the sale must thereafter be considered as valid. If so, the equitable title would immediately pass. The cases from different jurisdictions are somewhat divided on the question as to whether a judicial sale binds the vendee from its date, or from and after the entry of an order of confirmation. There can be no question, however, under the weight of authority, but that confirmation finally passes the equitable title to the vendee, and that any loss thereafter occurring, without fault of either party to the sale, will fall upon such vendee. *Robertson v. Skelton*, 12 Beav. (Eng. Rep.) 260; *Robb v. Mann*, 11 Pa. St. 300; *McKechnie v. Sterling*, 48 Barb. 330; *Vance's Admr. v. Foster & Ray*, 9 Bush 389; *McLaren v. Hartford Fire Ins. Co.*, 1 Selden (N. Y.) 151; *Maul v. Hellman*, 39 Neb. 322, 58 N. W. 112; *Ball v. First National Bank*, 80 Ky. 501; *Morrison v. Burnette*, 154 Fed. 617; 2 Cooley, Briefs on Law of Insurance, p. 1753d.

"Upon the confirmation the purchaser is entitled to a deed and writ of possession, and therefore to the rent; he

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is bound to pay the purchase-money, and assumes the hazard of accidental destruction of the property." 2 Woerner, *American Law of Administration* (2d ed.), § 478.

In *Robb v. Mann*, *supra*, an administrator's sale had been made and confirmed. The purchase money had not been paid, possession had not been given, nor had the administrator's deed been delivered. Portions of the buildings and improvements were destroyed by a wrongdoer, without fault of either party to the contract of sale. On action by the administrator for the purchase money, the court, in sustaining his right to recover, said:

"So much is the vendee considered, in contemplation of equity, as actually seized of the estate, that he must bear any loss which may happen to the estate between the agreement and the conveyance; and he will be entitled to any benefit which may accrue to it in the interval. And the reason assigned is, that, by the contract, he is the owner of the premises, to every intent and purpose in equity; *Richter v. Selin*, 8 S. & R. 440; Sug. on Vend. ch. 4, p. 131-2, Amer. ed. This principle, which is indisputable, would seem decisive of the question, unless a distinction can be taken between a private and a judicial sale. But no such distinction has been recognized; rather the reverse has been ruled. Thus in *Stoeber v. Rice*, 3 Wh. 25, a sale by a sheriff is said to be attended with the ordinary incidents of a sale by an individual. And in *Bashore v. Whisler*, 3 W. 494, it is said, that a sale by an administrator under an order of the Orphans' Court for payment of debts, is a judicial sale, and that the principles which govern the one are applicable to the other."

In *Vance's Admr. v. Foster & Ray*, *supra*, the court said:

"The principle cannot, we think, be questioned that where at the time a sale is made no valid ground for setting it aside exists, the accepted bidder is entitled to his purchase, however much the property may appreciate in value between the sale and time for confirming it. This being so, why should he not be held bound by his purchase, although from accidental causes the property in the meantime may become impaired or depreciate in value."

In *Ball v. First Nat. Bank*, *supra*, the court said:

"The purchaser, from the confirmation, is entitled to a deed and writ of possession, and is bound to pay the purchase-money, and hazard the accidental destruction of the property even from the sale, and he is entitled, therefore, to the rent from the date of confirmation, but not from the sale, because he acquires no right to the possession until the sale is confirmed."

Applying the principles thus announced, we are compelled to hold that the appellant is entitled to tender a deed and collect the purchase money for the reason that, after confirmation, Reif became the equitable owner of the property and must suffer the loss resulting from the fire. This being true, there was a change in interest and title sufficient to release the respondent from liability on the policy. *Jump v. North British etc. Ins. Co.*, 44 Wash. 596, 87 Pac. 928. A different rule might prevail in judicial sales where a right of redemption remained in the insured; but that question is not now before us, no redemption from an administrator's sale being authorized in this state.

The appellant further contends that the trial court erred in refusing to make findings, to the effect that the agent of the respondent, who issued the policy, was apprised of all of the facts in relation to the administrator's sale and its confirmation, and that he made no objection thereto, but allowed the policy to stand. Such findings, if made, would be immaterial. No question is here presented as to the validity of the policy when first issued. The change in the title which avoided it occurred afterwards, and even though the agent of the respondent had known of such change, no duty devolved upon him to take any action by reason thereof, unless he was requested to do so by the assured.

The judgment is affirmed.

RUDKIN, C. J., MOUNT, DUNBAR, MORRIS, PARKER, GOSE, and CHADWICK, JJ., concur.

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Syllabus.

FULLERTON, J. (dissenting)—I am of the opinion that the purported sale was incomplete for want of payment of the purchase price and delivery of the property. I therefore dissent from the conclusion of the majority.

-[No. 7684. Decided August 12, 1909.]

NORTHERN PACIFIC RAILWAY COMPANY, *Respondent*, v.
MYERS-PARR MILL COMPANY, *Appellant*.¹

TRIAL — ARGUMENT — OBJECTIONS — APPEAL — PRESERVATION OF GROUNDS. It cannot be claimed that the court refused to allow argument to the jury on the value of timber, upon taking the other issues from the jury, by reason of the statement of the court that the only matter counsel could discuss was as to the amount of the timber cut and as to whether plaintiff was entitled to treble damages, there being no request made to permit discussion of the value, or any attempt to do so.

TRESPASS—CUTTING TIMBER—EVIDENCE—SUFFICIENCY. In an action for damages for cutting timber on the defendant's land, judgment is properly directed for plaintiff, where its title indisputably appears and defendant cut the timber without plaintiff's consent.

PUBLIC LANDS — GRANTS — RAILROAD RIGHT OF WAY — TITLE ACQUIRED—STANDING TIMBER. Act Cong., July 2, 1864, granting the Northern Pacific Railroad Company a four-hundred foot right of way across public lands, conveys a fee simple title, including the title to standing timber.

APPEAL—RECORD—PRESERVATION OF GROUNDS — INSTRUCTIONS—REQUESTS. Error cannot be assigned on an exception to the refusal to give a requested instruction, where the transcript does not show that a request therefor was made in writing and filed as required by Bal. Code, § 5064.

APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS. It is harmless error to refuse an instruction that the jury must find the value of timber at the time of the trespass, where there was no evidence of value at any other time, and the jury found the value upon ample evidence.

TRESPASS—CUTTING STANDING TIMBER—ACTIONS—TREBLE DAMAGES. An action for the wrongful and willful cutting of timber on the land

¹Reported in 103 Pac. 453.

of another, the complaint praying for treble damages, is an action in tort, under Bal. Code, §§ 5656, 5657, upon which treble damages may be awarded.

SAME—SPECIAL FINDINGS OF JURY. In an action for trespass in cutting standing timber, treble damages should be awarded as provided by Bal. Code, § 5656, where there was no claim by defendant, pursuant to Id., § 5657, that the trespass was casual or involuntary, and the jury found specially that the defendant had no probable cause to believe that the land was its own, and might, by the exercise of ordinary care, have ascertained that it belonged to the plaintiff.

SAME—VERDICT—INTERROGATORIES. Under Bal. Code, § 5657, limiting the recovery for timber cut on the land of another to single damages in case the trespass was casual or involuntary or if the defendant had probable cause to believe that the land was his own, an interrogatory submitted to the jury as to whether defendant had reasonable cause to believe the "land" was his own is in substantial compliance with the statute, and not prejudicial error, although the defendant claimed to own only the timber and not the land.

Appeal from a judgment of the superior court for Pierce county, Reid, J., entered February 3, 1908, upon the verdict of a jury rendered in favor of the plaintiff, in an action for trespass. Affirmed.

Emmett N. Parker and *J. C. Cross* (*A. Emerson Cross*, of counsel), for appellant.

J. W. Quick and *W. C. Morrow*, for respondent.

Crow, J.—Action by the Northern Pacific Railway Company, a corporation, against Myers-Parr Mill Company, a corporation, to recover damages for standing timber alleged to have been cut and removed from plaintiff's right of way. The defendant purchased from owners of adjoining lands certain timber standing thereon, and now contends that it in good faith believed it then acquired title to the timber in dispute. The plaintiff claims title to a right of way four hundred feet wide, located two hundred feet on either side of the center line of its railway track. The trial court found title in the plaintiff, and submitted to the jury the sole ques-

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tion of the amount of timber taken and its value. The jury returned a general verdict for plaintiff in the sum of \$259.50, and answered special interrogatories as follows:

"(1) How many thousand feet of timber did the defendant remove from the right of way of the plaintiff? One hundred and seventy-three thousand feet.

"(2) What was the value of the timber so cut and removed? One and 50-100 dollars per thousand feet.

"(3) Did the defendant have probable cause to believe that the land from which it was taken was its own? No.

"(4) Could the defendant, by the exercise of ordinary care and prudence, have ascertained that the land from which this timber was taken belonged to the plaintiff? Yes."

From a judgment for \$778.50, treble damages, the defendant appeals.

Appellant's first contention is that the trial court erred in refusing to permit its counsel to address the jury on the value of the timber taken, and in limiting the argument to a discussion of the number of feet of timber cut. We are unable to find that the record shows any such refusal. It reads as follows:

"Jury excused temporarily. The Court: I shall instruct the jury in this case to find a verdict for the plaintiff; the only matter counsel may discuss to the jury is as to the number of feet cut, and as to whether or not the plaintiff is entitled to treble damages. Objection by defendant. Exception reserved. The Court: The court takes judicial notice of the laws of the United States granting right-of-way to the Northern Pacific Company."

This extract from the record, which states all that occurred on the subject, shows that the trial judge held, as a matter of law, that the respondent owned the right of way and timber, and that he would not submit that issue to the jury. Nowhere does it appear that appellant's attorney specifically asked permission to discuss the value of the timber, that he was denied such privilege, or that he actually attempted its discussion and was interrupted by the trial court

or counsel for the respondent. If, by the statement made, appellant understood that the trial court intended to prevent any discussion of value, it should have made a direct request for permission to address the jury on that subject. Had it done so, its request would undoubtedly have been granted. If not, the court's refusal could then have been made to affirmatively appear in the statement of facts. On the record before us, we cannot consider this assignment, there being nothing to show that the appellant's counsel did not in fact discuss to the jury the question of value.

Appellant next contends that the trial court erred in instructing the jury to find for the plaintiff. It indisputably appears from the evidence that the right of way and timber belonged to respondent, and that appellant had cut the timber without its knowledge or consent. This being true, the instruction was proper. Appellant, however, contends that the respondent did not hold a fee simple title to the right of way under the act of Congress of July 2, 1864 (13 Stats. at L. p. 365), its argument being that an easement only was granted to respondent's predecessor the Northern Pacific Railroad Company, which was not sufficient to include title to timber. The supreme court of the United States has disposed of this question contrary to appellant's contention. *Northern Pac. R. Co. v. Townsend*, 190 U. S. 267, 23 Sup. Ct. 671, 47 L. Ed. 1044. Facts stipulated on the trial show respondent's title.

The appellant contends that the trial court erred in refusing the following requested instructions: "You are further instructed that the value of any timber that may have been cut by the defendant, was the market value of the timber at the time it was cut; and you will so find in your verdict." The record does not show that any written request for this instruction was made. It does show that, after the jury had retired, appellant's attorney took the following exception: "The defendant excepts to the court's refusal to give its request for instruction numbered 2, as follows."

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Opinion Per CROW, J.

Then follows as a part of the exception the instruction above mentioned. No written request for the instruction appears in the transcript to have been filed and made a part of the record as contemplated by our statute. Bal. Code, § 5064 (P. C. § 681); *Tergeson v. Robinson Mfg. Co.*, 48 Wash. 294, 93 Pac. 428.

Assuming, however, that the instruction was requested in writing, refused, and filed, yet, in the light of the record, the error assigned could not have been prejudicial to the appellant. No evidence tending to show value at any period of time other than about the time the timber was cut was admitted. The jury were instructed to find the value of the timber, and did so. The only evidence upon which they could have possibly predicated their finding related to the time when the timber was cut, and there was ample evidence of that character. Evidence of value at any time other than about the time of cutting, was excluded by the trial judge. This being true, the jury could not have been misled.

Appellant, by its remaining assignments of error, contends that the trial court erred in considering this cause as an action in tort, and in trebling the damages awarded by the jury. We fail to understand how the appellant can arrive at the conclusion that this is an action on contract. The respondent pleaded facts sufficient to show that appellant had wrongfully, wilfully, and without authority entered upon its right of way, had cut timber standing thereon, and in its prayer asked treble damages. While it is true, as appellant contends, that the prayer of a complaint is not a part of the pleading, in the sense that it can be regarded as an allegation, yet when the respondent did plead the wrongful acts of the appellant, it stated facts sufficient to constitute a cause of action arising in tort. This action is based on Bal. Code, §§ 5656, 5657 (P. C. §§ 1257, 1258). In *Tacoma Mill Co. v. Perry*, 40 Wash. 44, 82 Pac. 140, we held such an action to be for trespass arising in tort, and not upon contract.

The only question remaining for our consideration is whether the trial court was justified by the general verdict and the special findings, in awarding judgment for treble damages. Section 5656 provides for treble damages in an action of this character, while § 5657 provides that, where it appears upon the trial of the action, "that the trespass was casual or involuntary, or that the defendant had probable cause to believe that the land on which such trespass was committed was his own, . . . judgment shall only be given for single damages." At no time during the trial did the appellant claim its trespass was casual or involuntary, nor was there any evidence to show that it was of such a character. Hence, there was no reason for submitting any issue to the jury for its determination, other than the amount of timber cut, and its value. Appellant makes some criticism upon the answer of the jury to the third special interrogatory, contending that it can have no bearing on the issues, as neither party claimed that the *land* from which the timber was cut was owned by the appellant, but that the appellant claimed the *timber* only. The interrogatory and answer were in substantial compliance with the requirement of the statute, even though technically faulty in form in referring to *land* only. Taking the pleadings, the evidence, and special findings of the jury into consideration, we hold that it was the duty of the trial court to award judgment for treble damages.

There is no prejudicial error in the record. The judgment is affirmed.

MOUNT, FULLERTON, CHADWICK, and GOSE, JJ., concur.

DUNBAR, MORRIS, and PARKER, JJ., took no part.

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Statement of Case.

[No. 7506. Decided August 19, 1909.]

THE STATE OF WASHINGTON, *on the Relation of A. N.*
Maltbie, Appellant, v. CHARLES F. WILL
*et al., Respondents.*¹

COUNTIES—OFFICERS—SALARY—INCREASE DURING TERM. The salary of a county officer cannot be increased during the term for which he was elected by reason of an increase in the population of the county changing its classification by which the salary of its officers are determined; Const. art. 11, § 8, providing that his compensation shall not be increased after his election during his term of office; but a county officer is entitled to the salary for the classification to which the county in fact belonged at the time of his election, although the county commissioners did not determine the fact until after the election.

MANDAMUS — PROCEDURE — RELIEF GRANTED — PARTIAL RELIEF — COUNTY OFFICERS—SALARY. The procedure in mandamus being but a form of civil action under our code, it is not essential that the prayer be granted *in toto* or denied *in toto*; and upon an application for a writ to secure a salary warrant for more than the relator is entitled, the court may grant the writ for a warrant for the sum to which the party may be entitled.

COSTS—ATTORNEY'S FEES—MANDAMUS PROCEEDINGS. In mandamus by a county officer to secure a salary warrant, attorney's fees incurred in prosecuting the action cannot be allowed as damages, nor except as statutory taxable costs.

COUNTIES—CLAIMS—INTEREST. Upon the rejection, by the county commissioners, of a legal claim, the claimant becomes entitled to interest on the total amount of the claim from the date of its rejection.

Appeal from a judgment of the superior court for Douglas county, Steiner, J., entered May 6, 1908, upon findings in favor of the defendants, after a trial before the court without a jury, in an action for a writ of mandamus. Reversed.

Hannan & Clapp and *Arthur McGuire*, for appellant.

Sam B. Hill and *John W. Hanna*, for respondents.

¹Reported in 103 Pac. 479; 104 Pac. 797.

Crow, J.—Application to the superior court of Douglas county by A. N. Maltbie, for a writ of mandamus requiring the auditor and commissioners of said county, to issue a warrant for \$294.45, alleged to be due the relator for salary as county clerk. From a final judgment denying the writ, the relator has appealed.

The only question presented is whether the findings made require the issuance of a writ. The trial court found that the relator, A. N. Maltbie, was elected clerk of Douglas county in November, 1902, and re-elected in November, 1904; that he served two terms, from January 9, 1903, to January 14, 1907; that during that period he was paid a monthly salary of \$1,300 per annum, on the theory that Douglas county was a county of the sixteenth class; that at the date of his first election, on November 4, 1902, the population of Douglas county was 9,183; that on March 1, 1903, it was 10,168, and that on June 1, 1906, it was 16,310; that on August 1, 1906, the board of county commissioners, by its order entered and recorded, declared Douglas county to be in the twelfth class; that prior to the commencement of this action the relator made demand upon the county commissioners to allow him salary as follows: at the rate of \$1,350 per annum from January 12, 1903, to January 9, 1905; at the rate of \$1,350 per annum from January 9, 1905, to June 1, 1906, and at the rate of \$1,500, per annum from June 1, 1906, to January 14, 1907; that his claim was rejected; that the county auditor on demand refused to issue him a warrant for any sum, and that prior to the commencement of this action the relator engaged attorneys to prosecute the same, agreeing to pay them \$200. At the time of the commencement of this action similar applications were made by five other county officers, demanding additional salary for official services rendered prior to January 14, 1907, and they have stipulated that the disposition of this case on appeal shall control like appeals prosecuted by them.

The trial court having found that on November 4, 1902,

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Opinion Per Crow, J.

the date of appellant's first election, Douglas county had a population of 9,188, it was then a county of the sixteenth class, in which the clerk's salary was \$1,800. There can be no question but that the appellant was entitled to that salary and no more at all times from his induction into office on January 9, 1908, until the population increased to 10,168, on March 10, 1908. The first question to be determined therefore is whether the county having then attained sufficient population to be advanced to the fifteenth class, appellant's salary by reason thereof immediately advanced to \$1,850 from and after that date.

On the authority of *Anderson v. Whatcom County*, 15 Wash. 47, 45 Pac. 665, 88 L. R. A. 187, and *State ex rel. Smith v. Neal*, 25 Wash. 264, 65 Pac. 188, 68 Pac. 1135, appellant now claims that he was, after March 10, 1908, entitled to the increased salary of \$1,850. The cases cited do not sustain his contention. In the *Anderson* case the method of compensation of a justice of the peace was changed from fees to salary, in compliance with a self-executing provision contained in § 10, art. 4, of the state constitution, pertaining to cities having a population of more than five thousand. In the *Smith* case the population of Skagit county was ascertained by reference to the Federal census of 1900 as it existed in November, 1900, at the time the relator was elected.

When the appellant was elected in November, 1902, his salary based on the population then existing was \$1,800. If it could be increased during the term for which he was then elected, and when the population advanced to 10,168 in March, 1908, it might be again increased during the same term, on the same theory, provided a further advance in population occurred. The constitution, art. 11, § 8, requires that the compensation of a county officer, authorized and fixed at the date of his election, must continue without change during the entire term for which he is elected. If, during such

term, the county, by reason of an increase in population, is advanced to a higher class, the increased salary resulting therefrom cannot benefit the incumbent, but will be paid to his successor. This construction harmonizes the various sections of our constitution relating to the matter of an increase or decrease of salaries of public officers. Section 25 of art. 2 provides that the compensation of any public officer shall not be increased or diminished during his term of office. Section 25 of art. 3 provides that the compensation of state officers shall not be increased or diminished during the term for which they shall have been elected. Section 13 of art. 4 provides that the salaries of supreme and superior court judges shall not be increased *after their election*, nor during the term for which they have been elected, and § 8 of art. 11 provides that the salary of any county, city, town or municipal officer shall not be increased or diminished *after his election* or during his term of office. These sections disclose a consistent and uniform intention to prevent any increase or decrease in the compensation of public officers during their respective terms of office, and in the cases of judges and county officers not only during their terms but also at any time *after their election*.

Section 5 of art. 11 provides that the legislature shall regulate the compensation of county officers in proportion to their duties, and for that purpose may classify counties by population. In compliance with this section the legislature has enacted laws classifying counties on the basis of population and fixing salaries therein. Section 1 of the original act, chapter 10, Laws 1889-90, page 302, provided that the population as a basis of classification should be first ascertained by the Federal census of 1890, and thereafter every two years by the county and precinct assessor's enumeration. By the amendment of March 18, 1901, chap. 136, Laws 1901, page 289, this method of ascertaining population was omitted from § 1 (Bal. Code, § 1563) without substituting

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any other, and in *State ex rel. Smith v. Neal, supra*, this court said:

"In the absence of any law pointing out how that population should be ascertained, the board of county commissioners can determine the fact by proof, just as it can determine any other fact necessary for the discharge of its duties. By the act of March 18, 1901, § 1 of the act of March 20, 1890, was amended in several particulars, and all reference as to how and by what means the population should be ascertained was omitted. This omission leaves this last act without force, unless the boards of county commissioners or the courts are authorized to ascertain the population. The enactment of the law of March 18, 1901, without reference to the mode of ascertaining the population of classified counties, strengthens the view we have adopted in this case that it was the intention of the legislature to leave that matter, as incident to its duties, with the board of county commissioners, and the courts in case the action of the board of county commissioners was questioned. We think that the court below was justified in receiving proof of the population of Skagit county in *November, 1900, when the county clerk was elected*, and that he was entitled to be paid by the board of county commissioners according to the population of Skagit county, and that the Federal census for 1900 is competent evidence to prove this population;"

It was thus determined that, for the purpose of ascertaining the class to which a county properly belonged and fixing salaries, the county commissioners and superior court were authorized to determine the population as it existed when the county officers were elected, and that they should be compensated accordingly. This court did not decide that population might be ascertained as it existed at any other time during a term, for the purpose of advancing a county to a higher class and increasing the compensation of incumbent county officers after their election and during their existing terms. Such a holding would have required a ruling in violation of the inhibition contained in § 8, of art. 11, *supra*. This court has repeatedly passed upon the various sections

of the constitution prohibiting any increase or decrease of the compensation of public officers during their terms or after their election, and has uniformly held that no such increase or decrease can be permitted. *State ex rel. Davis v. Clausen*, 47 Wash. 372, 91 Pac. 1089; *State ex rel. Ross v. Clausen*, 47 Wash. 607, 92 Pac. 453; *State ex rel. Funke v. Board of Commissioners*, 48 Wash. 461, 93 Pac. 920. *State ex rel. Smith v. Neal*, *supra*, is in harmony with all of these decisions, as it was there held that the clerk of Skagit county was entitled to compensation for his entire term based on the population, as it existed in November, 1900, the date of his election.

Our conclusion therefore is, that as the appellant's salary was \$1,300 at the date of his election in November, 1902, it so remained during the term for which he was then elected, without regard to any subsequent increase or decrease in the population of Douglas county; that after his re-election in November, 1904, he was entitled to the salary of \$1,350, based upon the population of 10,168, then existing, but that he was not during such second term entitled to any further advance based upon the population of 16,310, as ascertained in June, 1906. Although entitled to the advance salary of \$1,350 during his second term, appellant only received \$1,300 per annum, and Douglas county is now indebted to him for the additional compensation of \$50 per annum for that entire second term.

The respondents do not seriously dispute this conclusion, but contend that no relief can be given in this proceeding, further contending that an application for a writ of mandate will not be granted in part and denied in part; that it must be denied *in toto* if any part of the relief demanded should be refused, and that appellant having asked for a sum greater than that to which he is entitled, can in this proceeding obtain no writ to compel the issuance of a warrant for any smaller sum. We do not think this position can be sustained.

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Under our code an application for a writ of mandamus is the commencement of a civil action. It is one method of procedure for the enforcement of rights and the redress of wrongs. No alternative writ was requested or issued. The appellant has only asked that a peremptory writ be finally granted after trial. We think he is entitled to a writ in this proceeding directing the issuance of a warrant for such sum as he may be entitled to recover, even though it be less than originally asked by him. This conclusion results from former rulings of this court relative to the writ of mandamus, its functions and powers, and the proper procedure to be adopted on the trial of mandamus proceedings. *State ex rel. Brown v. McQuade*, 36 Wash. 579, 79 Pac. 207; *State ex rel. Barto v. Board of Drainage Com'rs*, 46 Wash. 474, 90 Pac. 660. In *State ex rel. Wolfe v. Parmenter*, 50 Wash. 164, 96 Pac. 1047, this court, by writ of mandamus, granted less relief than was demanded in the original application. *Commissioners of Highways v. Jackson*, 165 Ill. 17, 45 N. E. 1000.

The appellant insists that he is entitled to recover \$200 attorney's fees from Douglas county, as his damages incurred by reason of the refusal of the county officers to allow and pay his claim. This contention cannot be sustained. The statute of this state fixes the attorney's fees that may be allowed to a successful litigant as costs in civil actions, and no additional fees for their prosecution should be allowed without statutory authority.

The judgment is reversed, and the cause remanded with instructions to grant a writ of mandate directing the issuance of a warrant to the appellant for additional salary from January 9, 1905, to January 14, 1907, at the rate of \$50 per annum. The appellant will recover costs in this court and in the superior court, including statutory attorney's fees.

DUNBAR, PARKER, GOSE, MORRIS, and FULLERTON, JJ.,
concur.

ON PETITION FOR REHEARING.

[*En Banc*. Decided November 5, 1909.]

PER CURIAM.—Appellant has filed a petition for rehearing, in which he says:

“Appellant is entitled to interest on the total amount of his recovery from the date of rejection of his claim by the Board of County Commissioners, to wit: January 16th, 1907.”

Appellant is entitled to the interest as claimed. The opinion heretofore filed herein must be so construed, and no correction or modification is therefore necessary.

The petition will be denied.

[No. 7207. Department One. August 25, 1909.]

In re THIRD AVENUE, SEATTLE.

THE CITY OF SEATTLE, *Respondent*, v. SEATTLE ELECTRIC COMPANY, *Appellant*.¹

MUNICIPAL CORPORATIONS—IMPROVEMENTS—PROPERTY ASSESSABLE—STREET RAILWAY FRANCHISE. Under Laws 1907, p. 316, authorizing the assessment for local improvements of lots, blocks, tracts or parcels of land “or other property,” the franchise of a street railway company to use a street is not *ejusdem generis* or assessable, but is an easement only, and of an intangible quantity; and such statutes will not be enlarged by construction.

Appeal from a judgment of the superior court for King county, Griffin, J., entered October 11, 1907, confirming an assessment made by commissioners appointed to assess property specially benefited by a local improvement, after a hearing before the court without a jury. Reversed.

James B. Howe and *Hugh A. Tait*, for appellant.

Scott Calhoun and *King Dykeman*, for respondent.

¹Reported in 103 Pac. 807.

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Opinion Per Gose, J.

Gose, J.—The respondent instituted this proceeding for the purpose of widening Third avenue in the city of Seattle from the north line of Yesler Way to the south line of Park street. A trial was had for the purpose of ascertaining the compensation to be made for the property taken and damaged. Thereafter the board of eminent domain commissioners, to whom the matter was referred, prepared an assessment roll for the purpose of creating a fund with which to pay the damages awarded. The board, *inter alia*, assessed the appellant's "right of way, right of occupancy, franchise, and interest in Third avenue in the city of Seattle," in the sum of \$8,365, for alleged benefits incident to the widening of the avenue. The appellant in due time filed its written objections to the assessment, raising numerous questions touching its validity, all of which the court overruled, and entered a judgment confirming the assessment, from which this appeal is prosecuted.

The view we take of the case limits our inquiry to the single question, viz., Was the assessment as to the appellant's franchise authorized by statute? The respondent relies upon Laws 1907, page 316, *et seq.*, to support the judgment. The appellant owns and operates an electric railway on certain streets in the city of Seattle, including Third avenue, under a franchise which consists of the right to "locate, lay down and maintain tracks, conduits and all necessary equipment of every sort, and to erect poles and string wires for street railways, and to construct, maintain and operate a system of street railways within the city of Seattle along the routes (specified in ordinance No. 5874), and to carry passengers, mails and freight thereon, and to charge and collect fares and freight therefor." The former law on this subject, Bal. Code, § 796 (P. C. § 5070), Laws 1893, p. 197, provided that commissioners should "assess the amount so found to be of benefit to the property upon the several lots, blocks, tracts and parcels of land in the

proportion in which they will be severally benefited by such improvement."

In *Seattle v. Seattle Elec. Co.*, 48 Wash. 599, 94 Pac. 194, 15 L. R. A. (N. S.) 486, the city of Seattle sought to assess this franchise as "right of way and trackage," in a certain district which it was then improving. In considering the question of its power to do so under the statute quoted, this court, speaking through Fullerton, J., said:

"A reading of this section makes it at once apparent that the commissioners are authorized to assess only lots, blocks, tracts, and parcels of land specially benefited to pay the costs of a street improvement, and unless the respondent's interests in this street can be held to be one or the other of these there is no authority for the charge the commissioners sought to impose upon it. It seems to us that it cannot be so held. The respondent's right in the street is in no sense a lot, block, tract or parcel of land. It does not own the fee of the street over which its tracks are laid and its cars operated, nor does it have dominion or control over that portion of the street. On the contrary, the fee of the street rests in the abutting property holders, to whom it will revert when the interests of the public therein cease from any cause, and dominion and control over it is vested in the public authorities in whom it will remain as long as the street retains its public character. The respondent's rights therein are such and only such as these public authorities have conferred, and are, roughly speaking, the right to construct and maintain for a limited time a railway track on a fixed portion of the street, and the right to operate cars on such track for the purpose of carrying passengers and freight for hire. This does not constitute either a lot, block, tract or parcel of land, nor does it constitute an interest in land as that term is ordinarily understood, it is an easement only, and as such is not assessable under a power to assess lots, blocks, tracts and parcels of land."

Speaking to the same question, in *In re Third, Fourth and Fifth Avenues*, 49 Wash. 109, 94 Pac. 1075, 95 Pac. 862, at page 119, we said:

"Street railway companies are sometimes required, as a condition for enjoying the franchise to occupy the street, to

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contribute to the expense of street improvements. In that manner they sustain a contractual relation to the city, but that is altogether different from an attempt to levy and enforce an assessment *in rem* against a thing so intangible as the mere right to operate cars upon a street owned by the public."

Practically the only change made in the statute quoted, by the law of 1907, was to add, after the words "lots, blocks, tracts or parcels of land," the words "or other property." The respondent contends that these words enlarge the scope of the property subject to assessment so as to include the assessment in controversy, whilst the appellant asserts that they cannot be given such force. We think the appellant's contention must prevail. We have said in the *Seattle* case that the franchise sought to be made the subject of the assessment is not "an interest in land," but an "easement" only; and in the *Third, Fourth and Fifth Avenues* case, that it is an "intangible" quantity. If the legislature intended to grant the power to assess the franchise of a street railway company, it should, and no doubt would, have provided for such assessment in plain and express terms. We cannot assume that, in using such general words following associated analogous words of a well understood meaning, it intended to embrace property foreign to the class provided for by the specific words. Such an interpretation would create a right in the city by a construction which the words do not justify.

The property sought to be assessed is not *ejusdem generis* to "lots, blocks, tracts and parcels of land." In *State ex rel. Chamberlain v. Daniel*, 17 Wash. 111, 49 Pac. 243, it was held, applying the rule of *ejusdem generis*, that an exemption of \$500, and improvements upon land in a like sum, in favor of each person liable to assessment, was not within the provision of art. 2, § 7 of the constitution, permitting the exemption of "property of the United States and of the state, counties, school districts, and other municipal corporations and such other property as the legislature may by

general laws provide." In *People v. New York & Manhattan Beach R. Co.*, 84 N. Y. 565, it was held that real property is not within the purview of an act enumerating "money, funds, credits, and property." In *First Nat. Bank of Joliet v. Adam*, 138 Ill. 483, 28 N. E. 955, it was held that a provision in a lease giving a landlord a lien for rent "upon any and all goods, chattels or other property belonging to the lessee," does not include buildings afterwards erected on the leased premises. In *Berg v. Baldwin*, 31 Minn. 541, 18 N. W. 821, it was held that the statute giving treble damages against any person who should carry away any "wood, timber, lumber, hay, grass, or other personal property" did not apply to taking "two young oxen." In *Livermore v. Freeholders of County of Camden*, 29 N. J. L. 245, it was held that an injury sustained by the plaintiff's mill dam and sluice over a certain stream, caused by the fall of a county bridge upon the dam and sluice gates, gave him no cause of action under a statute which provided that if any damage should happen to any person, his, her, or their team or other property, by reason of the insufficiency or want of repair of any bridge upon any public road, the person sustaining the damage should have a right to recover his damages against the board of freeholders. See, also, *Dietz v. Mission Transfer Co.*, 95 Cal. 92, 30 Pac. 380; Sutherland, Statutory Construction, § 284. Statutes conferring the power to levy and collect assessments for special benefits will not be enlarged by an equitable construction. *Buckley v. Tacoma*, 9 Wash. 253, 37 Pac. 441.

The case will, therefore, be remanded with directions to vacate the judgment as to the appellant and sustain its objections to the assessment roll. The appellant will recover its costs.

RUDKIN, C. J., CHADWICK, FULLERTON, and MORRIS, JJ.,
concur.

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Statement of Case.

[No. 7959. Department One. August 25, 1909.]

JOHN KLUSKA, *Respondent*, v. W. C. YEOMANS, *Appellant*.¹

MASTER AND SERVANT—NEGLIGENCE—ACCIDENT TO TRAINS—PRESUMPTIONS—PLEADING—SPECIFIC GROUNDS. The right to the presumption of negligence arising from proof of an accident to a train is not abandoned by reason of the fact that specific acts of negligence were alleged and no proof was made of such specific acts.

SAME—PLEADING AND PROOF—ISSUES—AMENDMENTS. Where defendant's proof showed the specific cause of the accident to be other than that alleged in the complaint, the plaintiff is entitled to the benefit of all the proofs, on challenge to the sufficiency of the evidence, as the complaint will be deemed amended to conform to the proof.

SAME—NEGLIGENCE OF MASTER—RAILROADS—ROADBED. Where the brass in the axle of a logging car is liable to be misplaced, allowing the frame to drop down, it is negligence for the railroad company to use the road, for the carriage of employees, after the county had so placed planking at a county road crossing that the planks would catch the frame of the car and cause injury to an employee riding on the cars.

SAME—NEGLIGENCE OF MASTER—EVIDENCE—SUFFICIENCY. The evidence sustains a recovery for injuries received by an employee riding on a logging train, notwithstanding the appliances were of standard make and in common use, where it appears that it was a common occurrence for the brasses in the axle of the trucks to slip out, without any fault, allowing the frame to drop down, and that the frame thereby caught upon planks put down by the county at a county road crossing, and that the planks had been laid for several days, and long enough to give the defendant notice thereof, or to put defendant on inquiry; there being a conflict in the evidence as to whether the plaintiff had been notified not to ride upon the train.

SAME—NOTICE TO MASTER—TIME—QUESTION FOR JURY. In such a case, where new planking had been laid at the crossing several days before the accident, and had been run over for at least two days, the time was sufficient to charge the defendant with notice of the change or to put defendant on inquiry; and the question of notice would be one of fact for the jury.

Appeal from a judgment of the superior court of Lewis county, Rice, J., entered September 30, 1908, upon the ver-

¹Reported in 103 Pac. 819.

dict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee riding on a logging train. Affirmed.

George Dysart and Hayden & Langhorne, for appellant.
Bates, Peer & Peterson, for respondent.

FULLERTON, J.—The respondent recovered a judgment against the appellant for personal injuries, and this appeal is taken therefrom. In his complaint the respondent alleged, in substance, that the appellant was engaged in the business of manufacturing and selling lumber, at the town of Pe Ell, in this state, and owned and operated in connection with his business a line of railroad; that, as a part of the equipment of his road, the appellant owned an engine and certain logging trucks or cars, which, at the time of the respondent's injury, he had transformed into gravel cars by connecting two of the trucks together with a reach or pole and laying on the trucks so connected planks and boards forming a bed; that on November 17, 1906, the respondent was in the employment of the appellant as a common laborer, and was put to work on the gravel train, his duties being to assist in loading the train at one point of the road and unloading it at another under the direction of the appellant's foreman; it also being his duty, in order to facilitate the work, to board the cars and ride thereon from the place of loading to the place of unloading. The cause and manner of his injury he alleged in the following words:

"That on said 17th day of November, 1906, at about the hour of 11:30 o'clock in the forenoon of said day, plaintiff was working at his said employment of laborer for said defendant and had assisted in loading said train of cars aforesaid with gravel and dirt; that said train of cars were at said time ready to proceed to the place of unloading designated by the foreman in charge of said work, under whose direction plaintiff was then working, and plaintiff was directed to ride upon one of said cars and was required to ride upon one of said cars in the performance of his duty, to the

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Opinion Per FULLERTON, J.

place of unloading. That said car upon which plaintiff was required to, and did, ride at said time in the performance of his duties to complete said work of unloading, was an old, worn and defective logging car, which had long been owned and used by said defendant, and that the equipment of said car, and the fastenings, and the reach holding the front and back of said car together, for some time prior to said date, were carelessly, negligently and wantonly suffered and permitted by said defendant to be and remain out of repair, and were in such a worn, used and unfit condition as to render said logging car unsafe and unfit for the purposes required of it, which defective and unsafe condition of said logging car and its equipment was known to said defendant for a long time prior to said accident, or could have been known to said defendant by the exercise of ordinary care and proper inspection of said car, but which defects were unknown to plaintiff and could not by the exercise of reasonable care have been known to said plaintiff. That at about the hour of 11:30 in the forenoon of the 17th day of November, 1906, after plaintiff had got on board of said car, and while he was proceeding upon said car to the place where said gravel and dirt was to be unloaded, and when said car had reached a certain trestle on said defendant's line of railroad about a half mile south of said defendant's saw mill, the pole, or reach holding together the trucks of the car upon which plaintiff was riding broke away from and became loosened from one of the trucks of said car, owing to the worn and delapidated condition of the equipment of said car, causing said car to be drawn and broken apart by the engine then drawing said logging train, and causing the bed or planks on said car upon which said gravel and dirt was loaded, and upon which plaintiff was then riding, to be thrown from off said trucks and down upon the ties and track of said railroad and causing the plaintiff to be thrown down between said parted trucks onto said ties and track under said car in such a manner that his left arm was caught between the ties of said track, and the rear truck of said car not having wholly broken away and rolling over and on said plaintiff, twisted plaintiff's said left arm between the ties of said track in such a manner that plaintiff's said arm was broken in two places, and plaintiff's back, hips and thighs injured and wrenched, and other parts of plaintiff's body bruised and maimed, caus-

ing plaintiff to receive a severe nervous shock to his whole system."

For answer the appellant denied specifically the allegations of negligence set out in the complaint, and alleged that the respondent assumed all risk of injury by accepting employment from the appellant and engaging therein.

On the trial of the action the respondent offered no evidence tending to show a defective condition of the pole or reach, further than that it broke and allowed the trucks to pull apart, and the jury found by a special finding that it was not defective. It was shown that the accident was caused by another defect entirely. It appeared that between the place of loading the gravel and the place of its unloading, a wagon road crossed the railroad track. At this crossing, to form a bed for the road, planking had been laid parallel with the rails and spiked to the ties. The accident occurred at this crossing. When the last truck on the hindmost car reached the crossing, certain iron bolts which protruded through the frame of the truck caught on the planking and caused sufficient strain to pull out the reach and allow the trucks to spread apart far enough to drop the load of gravel onto the railroad track. After the respondent rested his case in chief, the appellant called witnesses whose evidence tended to explain the cause of the defect. It was shown, that the appellant's trucks were standard logging trucks of the kind in use on practically all of the logging railroads of the state; that as a necessary part of their construction, there is fitted into the top of the axle box a brass piece with a surface shaped to fit the axle of the truck and which when properly adjusted forms the surface on which the axle revolves; that these brass pieces, owing to the character of the load usually carried on the trucks, the unevenness of the track over which they are hauled, and the rough usage the trucks receive, are extremely liable to slip out of place, letting the frame drop down until it catches on the steel plate that forms the top of the axle box; that this has

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the effect of lowering the frame of the truck and increasing its liability to catch on anything put upon the roadbed. It was further shown that the truck caught on the plank in this instance because of the slipping out of one of these brass pieces. It was shown also that it was a common circumstance for these brass pieces to slip out, not only on the appellant's road, but on all similarly equipped roads, some of the witnesses going so far as to say that no means had yet been found to make them absolutely secure when subjected to the uses to which they were put upon the ordinary logging road.

At the conclusion of the evidence the appellant challenged its sufficiency to support a verdict for the respondent, and moved the court to instruct the jury to return a verdict in his favor on the ground that the respondent had failed to prove any actionable negligence on his part. The motion was overruled and the cause submitted to the jury, who returned a verdict in favor of the respondent, on which the judgment was entered from which this appeal is taken.

The appellant first contends that the respondent is not entitled to recover for the reason that he failed to sustain by proofs the specific acts of negligence alleged in his complaint. It is argued that the respondent, having stated a case of specific negligence, abandoned his right to the presumption arising from the rule of *res ipsa loquitur*, and voluntarily took upon himself the burden of proving the specific negligence charged. A number of cases from the supreme court and court of appeals of the state of Missouri are cited which seemingly sustain this position, but this court has heretofore had occasion to consider the question and has declined to follow the rule of these cases. On the contrary, we have followed the rule announced in Massachusetts, and perhaps other jurisdictions, which hold, in effect, that a plaintiff who proves the happening of an accident and is otherwise entitled to certain presumptions arising therefrom, does not lose the benefit of such presumptions because he has al-

leged what he conceived to be the specific cause of the accident. *Walters v. Seattle, Renton etc. R. Co.*, 48 Wash. 238, 98 Pac. 419.

But it seems to us that this question is not presented by the record before us. At the close of the evidence, when the challenge to its sufficiency was made, the specific cause of the accident was made to appear, and there was then no room for the application of presumptions. The respondent was then entitled to the benefit of all the proofs in his favor, that introduced by the appellant as well as that introduced by himself, and, unless the whole evidence made it clear that there was in law no liability, he was entitled to have his case submitted to the determination of the jury. If his complaint did not conform to the proofs, the defect was an amendable one, and the respondent would have been entitled to amend had a challenge been interposed to his right to recover on that ground. But no such challenge was interposed, and the trial court, as well as this court, must treat the complaint as sufficient. The respondent's right to recover, therefore, does not depend on the doctrine of *res ipsa loquitur*. He must recover, if he recovers at all, on a consideration of all of the evidence, and this, as we have stated, shows the specific cause of the accident.

The appellant next insists that the evidence as a whole clearly shows nonliability on his part. He argues that since he used standard made trucks, such as were in common use on all railroads of similar character to his own, and that since these brasses were liable to slip out of place at any time and no foresight could prevent their doing so, he cannot be held in law for an injury happening because thereof. But manifestly this falls far short of showing an exception from liability. Surely the roadbed could be constructed so that the frame of the car would not catch thereon, even should a brass drop out of place; and this being so, it was negligence, since he knew that the brasses were liable to slip, not to construct his roadbed so that danger would not arise

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therefrom. Or if it be impossible to construct the roadbed so as to be free from this charge, then it was his duty not to let his servants ride on the cars over the roadbed; or, at least, to so clearly point out to them the danger of riding thereon as to make the risk of injury for so doing their own. The appellant, evidently foreseeing this defect in his proofs, introduced evidence tending to show that he had promulgated general rules forbidding his employees from riding upon the cars. But these rules were not posted about his place of business, and whether they were communicated to the appellant was a disputed point, making it a question for the jury. He also introduced evidence tending to show that the wagon road crossing his railroad was a county road, and that the road supervisor in the course of his duties had laid new planking on the road crossing, and that it was on this new planking that the bolts in the truck frame caught; and from this fact his counsel strenuously argue his nonliability. But it was shown that these new planking had been laid several days before the injury, and had been run over by the appellant's cars for two days, at least, prior to that time. This was sufficient time to give the appellant notice that the change had been made, and put him upon inquiry as to whether his cars could pass over them with safety with the brass pieces out of place; or, at least, sufficient time to make the question of notice to him one of fact for the jury rather than a question of law for the court.

This view of the facts taken by us renders it unnecessary to notice the many questions of law suggested by counsel based on a different view, and renders it needless to pursue the inquiry further. The judgment will therefore be affirmed.

RUDKIN, C. J., GOSE, CHADWICK, and MORRIS, JJ., concur.

[No. 7845. Department Two. August 25, 1909.]

THE STATE OF WASHINGTON, *Respondent*, v. A. Z. ERICKSON,
Appellant.¹

CONSPIRACY—MONOPOLIES—SALE OF MILK—INFORMATION—SUFFICIENCY. An information sufficiently charges a conspiracy at common law, to control the price of milk in the city of S. when it alleges that the defendants unlawfully designing to prevent open competition, unlawfully agreed not to sell milk lower than certain fixed prices and not to sell to each other's customers, and agreed to and did raise prices with intent to control the price of milk generally in said city; and it is immaterial that only part of the milk dealers of the city entered into the same, since the purpose of their agreement was to create a monopoly.

SAME—EVIDENCE—ADMISSIBILITY—LETTERS OF CO-CONSPIRATOR. In a prosecution for conspiracy to create a monopoly in the sale of milk, letters written by one of the parties to the agreement a few days thereafter, showing on their face that they were written in furtherance of the conspiracy, are admissible against a defendant who was absent when they were written.

SAME—EVIDENCE—ADMISSIBILITY. In a prosecution for a conspiracy to create a monopoly to control the price of milk in a city, evidence on the part of the defendant that there were a number of other milk dealers in the city who had not entered into the agreement is immaterial.

CRIMINAL LAW—LIMITATIONS. A prosecution for conspiracy to create a monopoly in the sale of milk is not barred by the lapse of more than two years since such a conspiracy was first attempted, where there was a renewed attempt within one year, and the prosecution was for the latter offense.

TRIAL—INSTRUCTIONS IN WRITING. Where it does not appear that a stenographic report of instructions to the jury was made under a private contract with a party, it will be assumed, in the absence of anything in the record to the contrary, that the stenographer was under the direction and control of the court, thereby constituting the instructions a charge in writing, within the meaning of Laws 1903, p. 119, § 1.

Appeal from a judgment of the superior court for King county, Frater, J., entered October 26, 1908, upon a trial and conviction of the crime of conspiracy. Affirmed.

¹Reported in 103 Pac. 796.

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John E. Humphries and Geo. B. Cole, for appellant.

George F. Vanderveer, for respondent.

MOUNT, J.—The appellant and others were charged with entering into a conspiracy to control the price of milk in the city of Seattle. The appellant was found guilty and was sentenced to pay a fine of \$500, and to imprisonment in the county jail for ten days. He appeals from that judgment.

Several errors are assigned upon instructions, some of which the court gave to the jury and others the court refused to give. The correctness of these instructions depends upon the sufficiency of the information, which was challenged both before and during the trial. The charging part of the information is as follows:

“Said A. Z. Erickson, F. W. Anderson, S. Stray, J. C. Burnam, Alex. Murray, F. O. Kalberg, A. W. Lundberg, and C. Johnson, and each of them, in the county of King, state of Washington, on the 15th day of September, 1907, and on divers dates and days from thence continuously to and including the 31st day of October, 1907, being then and there severally and separately engaged in the business of selling milk in the city of Seattle, said county and state, and then and there unlawfully and injuriously designing and intending to prevent free and open competition in the sale of milk in the said city of Seattle and unlawfully and injuriously devising, designing, and intending to fix and control the price of milk in said city, did then and there continuously, unlawfully, wilfully, and fraudulently combine, conspire, and agree together with each other and with divers and sundry other persons organized and associated with them under the name Seattle Milk Exchange, that the said A. Z. Erickson, F. W. Anderson, S. Stray, J. C. Burnam, Alex. Murray, F. O. Kalberg, A. W. Lundberg, and C. Johnson, would not sell milk in said city of Seattle, on and after the 1st day of October, 1907, at prices lower than following, to wit: Bottled milk, 10 cents per quart; bulk milk, 10 cents per quart; pints, 6 cents; boarding houses, milk 30 cents per gallon, 75 cents per can; grocery stores, bottled milk 30 cents per gallon, bulk 25 cents per gallon. And that during the month of October, the said A. Z. Erickson, F. W. Anderson, S. Stray,

J. C. Burnam, Alex. Murray, F. O. Kalberg, A. W. Lundberg, and C. Johnson, would not sell or deliver milk to each other's customers or patrons or the customers or patrons of other dealers associated in said Seattle Milk Exchange, and in pursuance and furtherance of said unlawful conspiracy and confederation, did on or about the 20th day of September, 1907, circulate and distribute and cause to be circulated and distributed among themselves and other dealers in milk in said city of Seattle and among divers and sundry of their patrons and customers in said city of Seattle, cards and announcements announcing the prices of milk theretofore unlawfully agreed upon among themselves as hereinbefore alleged, and did raise the prices at which their milk was sold in said city of Seattle in conformity with said unlawful agreement, conspiracy and confederation, and during the month of October, 1907, did refrain and did cause and encourage each other, and all their employees, servants and agents to refrain from selling and delivering milk to each other's customers or patrons, or the customers or patrons of other dealers associated in said Seattle Milk Exchange."

It is contended by the appellant that this information charges only that the defendants named agreed that *they would not sell their milk* for prices less than stated, and that they would not sell or deliver milk to each other's customers; and it is argued that the persons accused had a lawful right to agree among themselves to sell their own milk at any reasonable price, and to such patrons, or to such persons, as they desired, and that such agreement was neither a combination to do an unlawful act or the doing of an unlawful act by unlawful means; and therefore the acts charged in the information do not constitute conspiracy at common law. We might readily agree to all this if the information charged no more than the appellant contends. But the information goes further than that. It plainly and directly charges that the defendants "unlawfully . . . designing and intending to prevent . . . open competition in the sale of milk in said city of Seattle . . . and intending to fix and control the price of milk in said city," unlawfully agreed that they would not sell milk lower than fixed

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prices, and would not sell or deliver milk to each other's customers, and in pursuance of this design circulated cards among dealers and customers announcing prices agreed upon, and raised the price at which *their* milk was sold. This clearly charges that the defendants entered into the agreement for the purpose of raising and controlling the price of milk generally within the city. In other words, the information charges a concerted action to accomplish an unlawful purpose, viz., to raise the price of milk generally. This constitutes the crime of conspiracy according to the rules stated in *State v. Messner*, 48 Wash. 206, 86 Pac. 636; *Ford v. Chicago Milk Shippers' Ass'n.*, 155 Ill. 166, 39 N. E. 651, 27 L. R. A. 298; *Chicago W. & V. Coal Co. v. People*, 214 Ill. 421, 73 N. E. 770. In the last case cited, the court say, at page 775:

"The first point made against the indictment is that the second and fourth counts do not charge a conspiracy at common law, in this: that the acts charged are not criminal or unlawful. Those counts charge that the object of the conspiracy was unlawful, and not that its object was lawful and the means for its accomplishment unlawful. It was therefore unnecessary to set out the means whereby the conspiracy was to be accomplished. *Thomas v. People*, 113 Ill. 581. Neither was it necessary that the object of the conspiracy constitute an offense against the criminal law for which an individual might be indicted and convicted, . . . but, if the object thereof was unlawful, said counts sufficiently charge a conspiracy at common law."

The fact that only a part and not all of the milk dealers were engaged in the conspiracy is entirely immaterial, for the defendants were charged with a conspiracy for an unlawful object. Whether they had the power to carry out that purpose might depend to some extent upon the number of dealers engaged, but the fact that some were not included, and for that reason the purpose to be accomplished might become more difficult, does not alter the case. It is possibly true, as argued by the appellant, that a person may lawfully fix his own price upon his own property, and what one

may lawfully do any number may associate together and likewise lawfully do. But this is not such a case. Here the purpose of the agreement was to control the price of milk generally, within the city of Seattle—milk belonging to others as well as that belonging to themselves. The purpose was not to fix a price for their own milk merely. The fixing of the price of their own milk was incidental to the purpose of fixing and controlling the price of other milk. Such purpose, if accomplished, necessarily tends to prejudice the consuming public and to create a monopoly, and is therefore unlawful. The cases of *Herriman v. Menzies*, 115 Cal. 16, 44 Pac. 660, 46 Pac. 730, 56 Am. St. 82, 35 L. R. A. 318; and *State v. Eastern Coal Co.* (R. I.), 70 Atl. 1, relied upon by the appellant, are not opposed to these principles, and do not control this case for reversal. We are satisfied that the information is sufficient. In view of what we have said above, it is not necessary to consider the assignments based upon the instructions, further than to say that the instructions given by the court covered the law of the case as we have concluded above.

Appellant argues that the court erred in admitting in evidence certain letters written by Mr. Stray, one of the defendants. It is claimed that these letters were declarations of Mr. Stray, made in the absence of appellant, and therefore not binding upon him. But it clearly appears from the evidence that Mr. Stray was a party to the agreement or conspiracy, and that these letters were written within a few days thereafter, and they show upon their face that they were written in furtherance of the conspiracy, and while the conspiracy was being carried on. They were therefore clearly admissible in evidence.

Appellant also argues that the court erred in excluding evidence to the effect that there were a number of other persons engaged in selling milk in Seattle besides the defendants; that these other persons were not parties to the agreement. The fact that the agreement or conspiracy did

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not comprise all the milk dealers in the city is entirely immaterial. The agreement or conspiracy being unlawful, those who entered into it were guilty whether the monopoly was complete or not. The evidence, however, shows very conclusively that the agreement was effective even though all the dealers were not parties to it.

It is also claimed that the court erred in not discharging the appellant upon motion, because it appeared that the conspiracy had ended and had been dissolved more than two years prior to the time the information was filed. It is true that a prior and unsuccessful attempt had been made, but the evidence very clearly shows that there was a renewed agreement and organization which was made within a year prior to the filing of the information. This was the one upon which the present charge was based. The information was therefore filed within time.

Appellant insists that a new trial must be granted for the reason that a request was made by the appellant for the court to instruct the jury in writing, and that the court failed to comply with this request because certain formal instructions were given orally. It appears, however, from the record that a stenographic report of the evidence and the instructions was taken by a stenographer at the trial. It does not appear that this stenographic report was a private one, as in *State v. Mayo*, 42 Wash. 540, 85 Pac. 251, nor does it appear that this stenographic report was not under the direction and control of the court. We must, therefore, assume that the stenographer was under the direction of the court. It follows, from the rule in *Sturgeon v. Tacoma Eastern R. Co.*, 51 Wash. 124, 98 Pac. 87, and cases there cited, that the statute was complied with, even though the court did not read from manuscript all his instructions to the jury.

We find no error in the record. The judgment must therefore be affirmed.

RUDKIN, C. J., PARKER, CROW, and DUNBAR, JJ., concur.

[No. 7920. Department Two. August 25, 1909.]

OLE JOHNSON, *Respondent*, v. W. H. COLLIER, *Appellant*.¹

MASTER AND SERVANT—EXCAVATIONS—CONTRIBUTORY NEGLIGENCE—ASSUMPTION OF RISKS—QUESTION FOR JURY. In an action by an employee for injuries sustained through the caving in of the walls of a pit, whether the plaintiff was guilty of contributory negligence or assumed the risks are questions for the jury, where it appears that the plaintiff, a young, inexperienced man, was directed to work in a pit dug in soft filled-in earth, which was soaked with water, that he did not know of the danger, was informed that the sliding earth did not amount to anything, and that two experienced men were working in the same pit at a more dangerous place than that assigned to the plaintiff.

COSTS—APPEAL—FAILURE TO APPEAR. Where respondent does not appear in the supreme court, he is not entitled to costs upon affirmance of the judgment.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered July 7, 1908, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee through the caving in of the walls of a pit. Affirmed.

Ballinger, Ronald, Battle & Tennant, for appellant.

MOUNT, J.—The plaintiff recovered a judgment of \$909 against the defendant, on account of personal injuries. The defendant, W. H. Collier, has appealed.

The case was tried to the court and a jury. The defendants, as contractors, were installing an oil burning plant in a building in Seattle. It was necessary to dig a pit in an alley in the rear of the building, in which pit the fuel oil tank was to be placed. This tank was to be connected with the basement of the building by means of pipes. The pit, twelve feet long by six feet wide and about thirteen feet deep, had been dug in the alley some three or four feet away from

¹Reported in 103 Pac. 818.

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the building. This pit was allowed to stand for several days. It filled up with water. Thereafter the plaintiff and two other men were set to work to dig the pit three feet deeper. This was done, and the fuel tank was placed in the pit. The plaintiff testified that, on the morning after the tank had been placed in the pit, one of the defendants directed him to dig a trench from the tank in the pit to the basement wall of the building. While engaged in this work, the bank of the pit caved in upon the plaintiff, and injured him. The plaintiff was a young man about twenty-one years of age. He had never engaged in this kind of work before. He testified that he did not know of the danger of the work, or of the place, and was not informed thereof, and was furnished no braces with which to secure the walls of the pit; that he told one of the defendants before the tank was placed in the pit that the earth was sliding in some, and was informed that the sliding earth did not amount to anything. It was also shown, that the earth in which the pit was dug was soft, filled-in earth; that it was soaked with water, and a large crack extended the length of the pit between it and the building. At the close of plaintiff's evidence, and again after all the evidence was before the jury, the appellant moved the court to take the case from the jury and direct a verdict in favor of appellant, which motion was denied.

The main point presented here is that the court erred in denying this motion, and it is argued that the respondent was guilty of contributory negligence as a matter of law, even though he obeyed the direction of the master in attempting to work as he was directed, and that by so doing he assumed whatever risk there was. Cases are cited from other courts which seem to support appellant's position, but we think the facts in this case bring it within the rule of *Hilgar v. Walla Walla*, 50 Wash. 470, 97 Pac. 498, where both of these questions were considered, and where we held, under similar facts, that both questions were for the jury. As bearing upon this question, the record shows, in addition to

the facts above stated, that two other persons were working in the pit at the time the respondent was injured. One, if not both, of these persons was an experienced man. These two persons were working in a more dangerous place in the pit than that in which respondent was working. They were both killed by the caving in of earth which injured the appellant. It seems reasonable to suppose that, if an experienced man would work in a more dangerous place than the respondent was working in, the respondent who was inexperienced might reasonably suppose that the place was ordinarily safe, especially when he had been directed by the master to work there, and had been told that the sliding earth did not amount to anything. We think that both these questions, under the facts shown, were properly questions for the jury.

It is also claimed that the court erred in refusing to give certain instructions, but an examination of the instructions given convinces us that these instructions were given in substance. The instructions in this case were fair, and correctly and completely covered the law of the case. We find no error therein.

The judgment must therefore be affirmed. Inasmuch as respondent has not appeared in the case by brief or otherwise, he is entitled to no costs on this appeal.

RUDKIN, C. J., CROW, PARKER, and DUNBAR, JJ., concur.

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[No. 8103. Department Two. August 25, 1909.]

THE STATE OF WASHINGTON, *on the Relation of J. R. Stirrat et al., Relators, v. E. W. Ross, as Commissioner of Public Lands, Respondent.*¹

PUBLIC LANDS—SALE—CONTRACT—AUTHORITY OF COMMISSIONER. Under Bal. Code, § 2198, giving the commissioner of public lands power to review and reconsider his official acts relating to public lands until a lease or contract has been executed and signed, the commissioner acts within his discretion in refusing to sign a contract for the sale of the whole of lots, where, pending the advertised sale, the legislature passed an act, which took effect after the sale, granting a city a right of way through the lots for a street.

Application filed in the supreme court May 10, 1909, for a writ of mandamus to the commissioner of public lands to compel the issuance of a contract for the sale of tide lands. Denied.

Charles A. Riddle, for relators.

The Attorney General, for respondent.

MOUNT, J.—Application for a writ of mandate, to compel the commissioner of public lands to issue a contract to relators for the sale of lots 2, 3, 4, and 5, in block 15, Ballard, now Seattle, tide lands. It appears that in February, 1909, the board of state land commissioners decided to sell these lots. The lots had theretofore been applied for and appraised and the appraisal approved. The sale was regularly advertised to take place on April 3, 1909. Prior to that date and on March 8, 1909, the legislature passed an act granting a right of way for a street one hundred feet in width across these lots to the city of Seattle. The act was approved March 20, 1909. Laws 1909, page 750. This act contained no emergency clause. The sale took place on April 3, 1909, as advertised. Bidders were notified that

¹Reported in 103 Pac. 824.

the sale was subject to said right of way. The relators bid in the lots at this sale for \$19,000, being \$15,000 in excess of the appraised value. The return of the sale was made to the board of state land commissioners, and was approved on April 21, 1909. The relators thereupon tendered the first payment, and made a demand upon the respondent state land commissioner for a contract of sale of the lots. The commissioner refused to execute the contract for the whole of the lots, but offered to execute and deliver a contract for the lots excepting the right of way granted to the city of Seattle by the act of March 20, 1909. Relators refused to accept this offer, and thereupon brought this action in mandamus. Thereafter, on May 11, 1909, the board of state land commissioners set aside the order of confirmation of the sale.

It is argued by the relators that the respondent has no arbitrary right to refuse to issue a contract of sale after confirmation thereof except for fraud. But this question seems to be clearly set at rest by Bal. Code, § 2198 (P. C. § 8236), which provides:

"The board of appraisers or commissions, or commissioner of public lands, shall have the right to review and to reconsider any of its official acts relating to lands of the state until such time as a lease or contract for the purchase of any of said lands shall have been made, executed and signed by the commissioner of public lands or by the board itself."

In considering this same question, in *Polson v. Callvert*, 38 Wash. 614, 80 Pac. 815, we said:

"This section of the statute permits a reconsideration of an order for the sale of tide lands, at any time prior to the execution of the deed of conveyance to the purchaser by the officer of the board authorized to execute the same, . . ."

No deed or contract had been executed in this case, and it therefore follows that the commissioner of public lands and the board of state land commissioners were vested with authority to reconsider their official acts relating to the sale. The act of March 20, 1909, contained no emergency clause. It

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was passed pending the sale, and the grant of the right of way to the city of Seattle for a street across this land did not attach until June 12, 1909. It is quite probable that the execution and delivery of a contract or deed to the purchaser prior to June 12, 1909, would have made the act a nullity so far as this grant was concerned. But, in view of the fact that the sale of the lots was ordered prior to the passage of the act and took place after its passage, the commissioner acted within his discretion under the statute above quoted and in justice to all parties, when he refused to execute a contract which would include the whole of the lots and thus render the act nugatory in so far as it applied to the lots.

The writ must therefore be denied, and it is so ordered.

RUDKIN, C. J., CROW, PARKER, and DUNBAR, JJ., concur.

[No. 8015. Department Two. August 25, 1909.]

RAGNHILD MARGARETHA BUGGE, *Respondent*, v. SEATTLE
ELECTRIC COMPANY, *Appellant*.¹

CARRIERS—NEGLIGENCE—NOTIFICATION TO PASSENGERS ALIGHTING—EVIDENCE—RES GESTAE. In an action against a carrier for negligently instructing a passenger to walk across a trestle to transfer over a washout to another car, evidence that such a notification was given to another passenger, and communicated to the plaintiff, is admissible as part of the *res gestae*, although not given in plaintiff's presence, where the car stopped at the washout and many passengers got out and started to walk across the trestle, and there was conflict in the testimony as to the notification.

CARRIERS—INJURY TO PASSENGER—NEGLIGENCE—INVITATION TO GO ON TRACK. It is negligence, warranting a recovery by a passenger, run down on a long trestle, for the street car company to invite passengers to transfer over a washout by crossing the trestle in the dark, with the assurance that no cars would cross the trestle that night, and while passengers were walking on the trestle to run them down by a car going in the opposite direction.

¹Reported in 103 Pac. 824.

SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. In such a case, the contributory negligence of the passenger was for the jury, where she had no notice of the height of the trestle some distance away, there was necessity of avoiding delay, and many other passengers were crossing.

SAME—WHO ARE PASSENGERS—INVITATION TO GO ON TRACK—TRESPASSERS. A passenger who took a street car to a certain destination, without being informed of a washout preventing the car from making the trip, is a passenger while walking across a trestle, on the invitation of the conductor, in order to transfer over the washout to a car at the other end of the trestle, regardless of what agency caused the washout, or of the fact that no written transfer was issued; and instructions that she was a trespasser are properly refused.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for \$15,000 for personal injuries is not excessive, where the plaintiff, a single woman, thirty-one years old, earning about \$75 a month as a housekeeper, was run down by a street car, her left leg cut off five inches below the knee, and her doctor's bill and other expenses amounted to \$500.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered November 4, 1908, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a passenger run down by a street car. Affirmed.

James B. Howe and *Hugh A. Tait*, for appellant.

Totten & Rozema (John E. Humphries, of counsel), for respondent.

MOUNT, J.—The plaintiff recovered a judgment against the defendant for \$15,000, on a verdict of a jury in the court below, on account of personal injuries. Defendant has appealed.

The facts are in substance as follows: The appellant was operating a street car line in the city of Seattle. This line extended from the business portion of the city to a part known as Ballard. The line was known as the Ballard line. It crossed a strip of tide lands on a trestle known as the Salmon Bay trestle. This trestle extended north and south and

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was about two thousand two hundred feet in length. Late in the afternoon of November 24, 1907, a city water main broke a short distance north of the south end of this trestle. The water from the main washed the foundation from one of the bents, rendering the trestle at this point unsafe for cars to cross, but persons could cross over on foot with safety. The trestle at this point, and for a short distance on each side thereof, was a foot or two above the level of the ground. From about the point of the washout the trestle extended up grade some five or six hundred feet to the highest point, where it was about twenty-eight feet in height. At this point it made an overhead crossing for a steam railway. It then gradually descended to the north end. The ties were about seven inches apart. There was no walk way for pedestrians.

At about 4:30 in the afternoon on November 24, 1907, the respondent, accompanied by her brother and a lady friend and two other gentlemen friends, took passage on one of appellant's cars, intending to visit friends in Ballard. They did not know of the washout. They paid their fare and were carried to the trestle at the point of the washout. There the car stopped, and the passengers were informed that the car would go no further on account of the washout. The respondent and her lady friend remained seated in the car while her brother and the two other men of the party went outside. They saw the condition and asked the conductor what they should do. They testified that the conductor told them that they could return to Seattle and there be transferred to another line by which they could go to their destination, or that they might go across the trestle and take another car on to Ballard; that no car would cross the trestle that night. Respondent's brother then went into the car and told respondent the substance of the conversation with the conductor. Thereupon respondent and her brother and lady friend went out of the car and looked at the condition, and, while standing near the car, respondent testified that she

heard the conductor say that the passengers could transfer back to Seattle or go across the trestle and take a car on the other side; that no car was coming across that night. Respondent and her brother and friends then talked among themselves as to what they should do. It was suggested that they would not have to come back that way, but could take a Fremont-Ballard car back another way, and that they would only have to walk across the trestle once. They thereupon decided to walk across and take a car on the other side. It was then between five and six o'clock and quite dark, almost as dark as it gets, the sky being cloudy. Looking toward the horizon, they could see the trestle one hundred to six hundred feet ahead. They could see the ties at their feet, but they could not see, looking down, more than about ten feet. Neither respondent nor her brother knew how long or how high the trestle was, although they had ridden over it on the cars. A number of the passengers had started to walk across the trestle before respondent and her party started, the number being estimated at from eight to twenty. Respondent and her party walked faster than the others and overtook and passed many of them.

When respondent and her companions had gone about five hundred feet, they saw a car coming toward them from the Ballard side. Two of the men hurried forward to meet and stop the car. They were in the middle of the track in the glare of the headlight, and shouted and waved their arms to stop the car, until the car came within a few feet of them. It did not stop, and they were compelled to jump onto a slab pile at one side of the track in order to avoid the car. All the party succeeded in getting off the track, except respondent. She was run down by the car, which cut off her left leg about five inches below the knee. The accident happened near a mill which stood beside the trestle near the middle thereof. The night watchman at the mill saw the car coming, and also saw the party upon the trestle, and attempted to hail the car by shouting. He threw a tin bucket against the car. Pas-

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sengers in the car heard the shouting and heard the bucket strike the car, but the motorman did not stop in time to avoid the accident. Passengers testified that the striking of the bucket against the car and the jar of running over the respondent were about simultaneous. At the time of the accident, the respondent was thirty-one years old, unmarried, and earning as housekeeper \$35 per month, besides her room and board, estimated at \$30 to \$40 per month. Her doctor's bills and other expenses for which she became liable amounted to something more than \$500.

The negligence alleged was, that respondent, not knowing of such washout, became a passenger upon one of the cars of the appellant with intention of going to Ballard; that when the car containing respondent reached the south end of such trestle, at about 5:30 o'clock in the afternoon, she and other passengers were informed by appellant that said car could proceed no further on account of such washout, and were carelessly and negligently instructed and permitted to cross said trestle for the purpose of meeting another car which would convey them to their destination; that the respondent, not knowing the danger involved in such proceedings, acting upon such instruction and permission, walked on and over said trestle and, while walking thereon, and about six hundred feet from the south end thereof, appellant, knowing that respondent was on said trestle, so negligently ran its said car southward bound, which was the car that was intended to meet respondent, that it ran against and over her, cutting off her left leg below the knee.

The first four assignments of error are to the effect that the court erred in permitting the companions of respondent to testify to conversations they had with the conductor, and to the fact that they communicated these conversations to the respondent. For example, respondent's brother testified as follows:

"I went out of the front door and I took a look around to see what had happened; saw the washout and conditions; then

I went to the conductor who was standing about near the middle of the car and I asked him . . . what we should do, and the conductor told me we could transfer back to Seattle or go across and take another car to our destination. With that information . . . I went back into the car and I told my sister and her companions what the conductor told me, and together we went out . . . I told my sister that there was a washout on the line so the car could not go across, and we would have to transfer back or go across the trestle and take the car there and go to Ballard."

It is claimed that this evidence was improperly admitted because it was *res inter alios acta*, and the conductor would not necessarily give the same instructions to male and female passengers; because it was but a mere expression of the opinion of the conductor's instructions; because Mr. Bugge did not communicate the exact instructions he received from the conductor; because the advice of Mr. Bugge was the act of a fellow passenger for which the appellant was not responsible; and because the statements of Mr. Bugge as to what the conductor told him were mere hearsay. We think none of these objections is sufficient to make the evidence inadmissible. The complaint alleged:

"That the respondent and other passengers on said car were notified by the defendant that said car could proceed no further . . . and said defendant . . . invited, instructed and directed . . . them to cross said trestle for the purpose of meeting another car which would carry them to their destination," etc.

These allegations were denied. When the car came to a stop and could proceed no further, naturally some notification was due to the passengers, and if any notification was given, either generally and openly or privately, such notification was a part of the *res gestae* and could be proved the same as any other fact. It was certainly explanatory of the conduct of the passengers. If the conductor, when the car stopped, had proclaimed to all the passengers on the car that the car would go no further but would return to the city, and that

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passengers desiring to continue their journey might alight and walk across the trestle to the other end, where they would meet a car and continue their journey, such declaration would certainly be admissible in evidence as a part of the *res gestae*, for the purpose of explaining the reason for persons alighting and being upon the trestle. The fact that such declaration was given upon inquiry and communication from one passenger to the other, and not by proclamation, would make the declaration none the less *res gestae*, and would be as binding as if announced generally so that all might hear. The fact of the declaration and notice to the passengers would control their conduct, and not the manner of it. If the conductor stood at the inside of the car and told the passengers as they attempted to leave the car "not to go on the trestle but wait for the transfer that would come; that the transfer car would be there soon. I warned the passengers . . . not to go on the trestle until the transfer car arrived, and it would likely be there at any moment," evidence of such warning would certainly be admissible as a part of the *res gestae* to show that the company was not negligent in permitting passengers to alight in a dangerous place. On the other hand, if passengers were invited to alight in a dangerous place, such invitation, if extended privately and communicated to others, would be admissible to show negligence on the part of the company and want of it on the part of the passenger. These were the conditions in this case. The conductor testified, as stated above, that he did warn the passengers to wait for a transfer and not to go on the trestle until the transfer arrived. The respondent and her witnesses stated that they were invited to cross over on the trestle to the other end. The facts, of course, were for the jury to determine.

It is argued by appellant that the evidence fails to disclose any negligence on the part of the company, and that it shows inexcusable negligence on the part of the respondent. Both of these positions depend of course upon whether

the respondent was rightfully upon the railway track, and whether the danger was so apparent that a reasonable person would not have undertaken to cross the trestle in the night-time. If the evidence of the respondent and her witnesses is to be believed, the company was negligent in inviting the passengers to cross the trestle and then running them down by a car which respondent was informed would not cross that night. Having invited the respondent to walk across the trestle, it was clearly the duty of the company to so run its cars as not to injure her while she was on the trestle with no means of escape. Whether the danger was so apparent that a reasonable person would not attempt to cross in the night, was also a question for the jury to consider with all the attending circumstances. The fact that respondent could not see how high the trestle was; the fact that it was necessary to walk across if she would avoid delay; the fact that she was invited by the conductor to cross and was informed by him that no car would be over that night; the fact that other passengers were crossing; were all circumstances which would tend to convince a reasonably careful person that she might cross with safety, and were proper to be considered by the jury. We are not disposed to say, under these circumstances, that the jury might not reasonably conclude that the invitation was given, and that respondent did not unreasonably expose herself to danger. The trestle was apparently safe enough but for the fact that the car came down upon them. It seems to us that the motorman on this car should have seen the party upon the track in time to have stopped his car. If he did not know that the trestle was out of repair, he certainly should have had his attention attracted by the shouting of the respondent's companions so that he could have stopped his car before he ran them down. If he knew the track was out of repair within five or six hundred feet from where he then was, it was inexcusable for him not to see the respondent in time to stop. We are satisfied that the question of negligence was for the jury.

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The court when instructing the jury defined what facts would constitute a person a passenger, and defined the degree of care owing by a carrier to its passengers, and then said:

"And in case of a break in the line of transportation caused by washouts or other agencies of that kind, and it becomes necessary for passengers to be transferred from one car to another to get over the break, the relationship of passenger and carrier continues during the progress of transferring from one point to another over the break, and it is the duty of the carrier to exercise the same degree of care to passengers while being transferred from one car to another, from one side of the break to another, as it is while actually on board the car."

It is argued by the appellant that, even if the conductor instructed the respondent to walk across the trestle, it cannot be held that she was a passenger while so doing. We think both reason and authority generally hold that she was a passenger. Her destination was Ballard. The car was supposed to run through to her destination. She was not informed otherwise. The company undertook to carry her to that place and was, of course, bound to do so. It gave her the option of going on by walking across the trestle or of going around another way. She remained a passenger under either option. If she assumed the risk of apparent dangers in walking the trestle, the company was in reason bound to exercise such care as not to run her down by a car about which she did not know and which she could not avoid. She did not assume such danger. The authorities also hold that the relationship of passenger continued in such circumstances. *Dwinelle v. New York etc. R. Co.*, 120 N. Y. 117, 24 N. E. 319, 17 Am. St. 611, 8 L. R. A. 224; *Jamison v. San Jose R. Co.*, 55 Cal. 593; *Conroy v. Chicago etc. R. Co.*, 96 Wis. 243, 70 N. W. 486, 38 L. R. A. 419; *Chicago & Alton R. Co. v. Winters*, 175 Ill. 293, 51 N. E. 901; *White v. Seattle, Everett & Tacoma R. Co.*, 36 Wash. 281, 78 Pac. 909, 104 Am. St. 948; *Blomsness v. Puget Sound Elec. R. Co.*, 47 Wash. 620, 92 Pac. 414, 17 L. R. A. (N. S.) 763;

Citizens' Street R. Co. v. Merl, 134 Ind. 609, 33 N. E. 1014.

Whether the break was caused by the railroad company or by some other agency can make no difference. Nor does it change the rule that no written transfer was issued. If it was understood that the destination of the passenger was reached when she alighted from the car at the point of the break, of course the relation of passenger ended at that point. But there seems to be no dispute that the company undertook to carry the respondent to Ballard, and that Ballard was the destination of the respondent, and not the place where she alighted to make the transfer. She was given the choice of two ways, but the relationship of carrier and passenger continued either way to the destination.

The court was requested to instruct the jury that the respondent was a trespasser upon the trestle, and that appellant owed the duty of reasonable care only to avoid injuring her after she was discovered. Whether she was a trespasser or not depended upon the fact whether she was invited there by the conductor, as she testified, or whether she was notified to await a car and not go upon the trestle. This question was, therefore, for the jury, and they were properly instructed upon it. We find no error in the instructions.

Appellant also contends that the verdict is excessive. We are not agreed under the facts disclosed by the evidence that it is excessive, and therefore decline to make any reduction. The judgment must therefore be affirmed.

RUDKIN, C. J., CROW, PARKER, and DUNBAR, JJ., concur.

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[No. 7849. Decided August 25, 1909.]

THE STATE OF WASHINGTON, *Respondent*, v. HEZEKIAH W.
BARNES, *Appellant*.¹

CRIMINAL LAW—FORMER JEOPARDY—DISCHARGE OF JURY—NECESSITY—DISCRETION OF COURT. A plea of former jeopardy is properly overruled, where it is based on the fact that at a former trial a jury was discharged on the statement of the foreman that the jurors could not agree upon the question of the sanity of the prisoner at the time of the commission of the offense, unless the court would instruct them as to whether the prisoner would be imprisoned for life or might be subsequently released; since the necessity for such a discharge is a matter within the sound discretion of the trial court, and no abuse of discretion appears where the jury had already deliberated forty-three hours.

JURY—DRAWING JURY—DIRECTORY PROVISIONS—APPEAL—HARMLESS ERROR. Statutory provisions for the drawing of a panel are mainly directory, and failure to precisely conform thereto will not warrant a reversal of a conviction, where none of the jurors were incompetent or improperly drawn, no prejudice against the defendant was shown or any of his rights injuriously affected, and he declined to use an additional challenge accorded him.

SAME—CHALLENGE TO THE PANEL—FOR CAUSE. A challenge to the panel is not sustainable by reason of the drawing of three jurors who had served on a former trial, since they could be challenged for cause.

Appeal from a judgment of the superior court for Walla Walla county, Brents, J., entered July 6, 1908, upon a trial and conviction of the crime of murder in the first degree. Affirmed.

E. F. Barker, Oscar Cain, and E. C. Mills, for appellant.

Otto B. Rupp, Herbert C. Bryson, and Thomas Phelps Gose, for respondent.

Crow, J.—The defendant, Hezekiah W. Barnes, having been charged with the crime of murder in the first degree and convicted, judgment and sentence were entered, and he has appealed.

¹Reported in 108 Pac. 792.

By his first assignment of error appellant contends that his plea of former acquittal should have been sustained, and that he should have been discharged by the trial court. The record shows that, on May 22, 1908, an information was filed charging him with the crime of murder in the first degree; that the case was first called for trial in June, 1908; that on June 13 it was submitted to the jury; that about ten o'clock a. m. on June 15 the jury were called into court, when the following proceedings were had:

"The Court: Gentlemen, have you agreed upon a verdict? Foreman: Your Honor, we fail to agree. The Court: What appears to be the difficulty? Foreman: The gentlemen appear to have a difference of opinion. The Court: Do your difficulties arise with regard to the whole case or to some particular branch of it? Foreman: The insanity part. The Court: Do you find beyond a reasonable doubt that the crime was committed by the defendant? Foreman: The crime has been committed. The Court: The question with you is whether the defendant— Foreman: —was sane or insane. The Court: At the time of its commission? Foreman: Yes, sir. . . . The Court: Gentlemen, you may retire and I will formulate some further instructions in regard to that branch of the case and try to explain to you what I think possibly you may have overlooked, and will call you in again later. (The jury retire.) Mr. Garrecht [attorney for appellant]: We will ask for an objection to any further instructions where the jury has not asked for any further instructions. The Court: Call in the jury. (The jury return to the court room). The Court: Gentlemen of the jury, I will ask you whether you wish me to instruct you any further. If not, if you fully understand my former instructions, I will not instruct you any further. Foreman: I will state, Judge, that the difference of opinion comes up in regard to the incarceration of the prisoner in the case of insanity, for life—life punishment; whether there's any chance of him being restored to liberty after he is incarcerated for a short time, or whether the committing of the crime will carry with it the life sentence. The Court: I cannot give you what the law is in regard to it now. I have got to give it to you in writing. That is the only point upon which you wish me to instruct you? Foreman: I think that being solved we can

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come to an agreement. With those instructions we are perfectly willing to retire and wait. Mr. Cain [attorney for appellant]: We have no objections to the court's instructing them on that point orally. You can read to them the section of the statute that covers it. The Court: I won't unless I am given full liberty, because I might say something that you might construe into something else. Foreman: We would rather have them in writing. The Court: I can't give them to you to read; I will have to read them to you. (Jury retire). . . .

"(Jury are recalled). The Court: Gentlemen, as I understand your foreman, you have agreed that the defendant committed the crime charged in the information, but you have not agreed as to whether he was sane or insane at the time of its commission; and I further understand from him that your finding upon that question depends upon whether the defendant can be imprisoned for life or whether he can be discharged at any time. Is that the state of the case? Foreman: That is the case. The Court: And without that knowledge as to whether he can be incarcerated for life or whether he can be discharged at any time, you think that you are unable to agree upon a verdict and will be unable to agree? You think that there will be no reasonable prospect of an agreement? Foreman: No, sir. The Court: I feel constrained, in view of these statements of yours, to discharge you from further consideration of the case. The fact that you are making your verdict in this case dependent upon the punishment, or what might be done with this defendant after this trial, satisfies me that you should not consider this case at all. It is not a matter for your consideration whether he would be discharged or not discharged. The law is, however, that he, upon certain contingencies, may be discharged at any time that he is restored to sanity, if you should find him to be insane; upon doing certain things, or upon certain things happening, that he could be restored to his liberty. But that ought not to enter into your consideration at all. It has nothing to do with the question of whether he was sane or insane at the time he committed the act. It goes to his punishment; and, in other words, to be plain and curt with you, it is none of your business; it is the business of the law; and I, therefore, seeing that you cannot agree without taking that matter into consideration (which

is entirely improper to take into consideration) feel that I would be doing the prisoner and the public both a great injustice to allow you to determine his guilt or innocence upon a question of that kind; and I therefore discharge you from further consideration of the case."

The case was again called for trial on June 24, 1908. The appellant then filed a plea of former jeopardy, in which he claimed that the discharge of the jury amounted to an acquittal. The state answered, the appellant demurred, the demurrer was overruled, and the appellant replied. Upon the second trial it was agreed that the plea of former jeopardy should be submitted to the jury. Two verdicts were returned, one finding the appellant guilty of murder in the first degree, and the other finding that he had not been placed in jeopardy or acquitted.

Appellant concedes that in a criminal case a trial court may, when necessary, discharge a jury that has failed to agree, without effecting an acquittal. He contends, however, that no such necessity arose in this cause; that the discharge was not demanded by imperious necessity; that it was made without his consent, and that it operated as an acquittal, barring further trial. To support this contention, he cites the following authorities: *McCorkle v. State*, 14 Ind. 39; *State v. Wamire*, 16 Ind. 357; *Commonwealth v. Fitzpatrick*, 121 Pa. St. 109, 15 Atl. 466, 6 Am. St. 757, 1 L. R. A. 451; *State v. McKee*, 1 Bailey Law 651, 21 Am. Dec. 499; *Conklin v. State*, 25 Neb. 784, 41 N. W. 788; *People v. Parker*, 145 Mich. 488, 108 N. W. 999; *Hines v. State*, 24 Ohio St. 134; *State v. Klauer*, 70 Kan. 384, 78 Pac. 802; *State v. Allen*, 59 Kan. 758, 54 Pac. 1060; *State v. Reed*, 53 Kan. 767, 37 Pac. 174, 42 Am. St. 322. These authorities, in so far as they tend to support the appellant's contention, are the outgrowth of the rule adopted in criminal cases by the early English courts, to the effect that a jury sworn and charged in a case of life or member, cannot be discharged by the court or any other, but that they ought to give a verdict. At an early date the courts of this coun-

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try refused to adopt or follow this rule, but held that when the jury could not agree on a verdict, the court had discretionary power to discharge them, and that the prisoner might be put on his trial before another jury. *Commonwealth v. Purchase*, 2 Pick. 521, 13 Am. Dec. 452.

There is, however, some conflict of authority in American courts on the question as to whether on their failure to agree, the discharge of the jury without the consent of the defendant will, in a criminal case, bar another trial. The courts of a few states hold that a bar will result, and the most pertinent cases cited by the appellant are from such courts. Most of the American authorities have announced the rule that the power to discharge the jury is within the sound discretion of the trial judge, and that his exercise of such discretion will not be reviewed by the appellate courts, unless its clear abuse appears. *State v. Costello*, 29 Wash. 366, 69 Pac. 1099; *United States v. Perez*, 9 Wheat. 579, 6 L. Ed. 165; *In re Allison*, 13 Colo. 525, 22 Pac. 820, 16 Am. St. 224; *State v. Harris*, 119 La. 297, 44 South. 22, 11 L. R. A. (N. S.) 178, and note; *Simmons v. United States*, 142 U. S. 148, 12 Sup. Ct. 171, 35 L. Ed. 968; *Thompson v. United States*, 155 U. S. 271, 15 Sup. Ct. 73, 39 L. Ed. 146; *Dreyer v. People*, 188 Ill. 40, 58 N. E. 620, 59 N. E. 424, 58 L. R. A. 869; *Penn v. State*, 36 Tex. Cr. App. 140, 35 S. W. 973; *Anderson v. State*, 86 Md. 479, 38 Atl. 937; *State v. Crump*, 5 Idaho 166, 47 Pac. 814; *United States v. Jim Lee*, 123 Fed. 741; *State v. Keerl*, 33 Mont. 501, 85 Pac. 862.

In *State v. Costello*, *supra*, the jury had deliberated from 1:40 p. m. on Tuesday until 9:30 a. m. on Wednesday, when they were called into court, reported they had not agreed, that there seemed to be no prospect of agreement, and were discharged. This court, in discussing the plea of former jeopardy, interposed on a subsequent trial, said:

"The statute provides (Bal. Code, § 5006), 'The jury may be discharged by the court . . . by consent of both

parties, or after they have been kept together until it satisfactorily appears that there is no probability of their agreeing.' By this section the lower court is invested with a discretion to discharge a jury after it has been kept together until it satisfactorily appears that there is no probability of their agreeing. This discretion must be based upon substantial grounds, and is subject to review like any other legal discretion. It appears here that the jury had been considering the case for more than nineteen hours, and that when asked by the court if there was any prospect for an agreement, answered, 'It seems not,' and stated, 'We have stood one way for twelve hours.' While in the question put by the court the word 'probability' is not used, still we think the question and the answer clearly indicate that there was no reasonable probability of an agreement, and that, under the conditions existing, the court did not abuse his discretion in discharging the jury."

In *Simmons v. United States, supra*, the court said:

"The general rule of law upon the power of the court to discharge the jury in a criminal case before verdict, was laid down by this court more than sixty years ago, in a case presenting the question whether a man charged with a capital crime was entitled to be discharged because the jury, being unable to agree, had been discharged, without his consent, from giving any verdict upon the indictment. The court, speaking by Mr. Justice Story, said: 'We are of the opinion that the facts constitute no legal bar to a future trial. The prisoner has not been convicted or acquitted, and may again be put upon his defense. We think that, in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. *They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances which would render it proper to interfere.* To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, courts should be extremely careful how they interfere with any of the chances of life in favor of the prisoner. But, after all, they have the right to order the discharge; and

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the security which the public have for the faithful, sound, and conscientious exercise of this discretion rests, in this, as in other cases, upon the responsibility of the judges, under their oaths of office.' *United States v. Perez*, 9 Wheat. 579."

The appellant most strenuously insists that, in this case, no necessity appeared for the discharge of the jury which was arbitrarily ordered without his consent. He further insists that a reasonable inference from all the proceedings would be, that had the jury been instructed to the effect that the question of punishment could not enter into their consideration, they would, on further deliberation, have been able to reach a verdict, and that their discharge violated his rights and constituted an acquittal. The record indicates that, on first impulse, the trial judge did contemplate preparing and giving written instructions as to the disposition of the appellant, in the event of his being found insane, and advising the jury whether he would thereafter be permanently deprived of his liberty. It is evident, however, that upon reflection he reached the conclusion that the question involved in such an instruction was not proper for their consideration, and should in no way influence or control their verdict. He then recalled the jury, and was informed by them that, without any knowledge as to whether the appellant would be imprisoned for life or discharged if found insane, they would be unable to agree. Thereupon, in the exercise of his sound discretion, based on these substantial grounds, he discharged the jury. They had already deliberated for more than forty-three hours, and announced that they could not agree unless given an instruction to which they were not entitled. Under these circumstances, we would not be justified in holding that the trial judge erred, or that he abused his discretion.

Nor should we order the discharge of the appellant who was convicted on his second trial. The trial judge was familiar with the trial, its proceedings, the evidence, and the personality of the jurors. He had opportunities for under-

standing the situation, not afforded this court, and was in a better position to determine whether the jury might agree. The foreman's first statement was that they had failed to agree. He further stated that they had no doubt the crime had been committed, and that their differences arose on the issue of appellant's sanity, because they did not know what punishment would be inflicted if they found him insane. The reasonable inference was that, if they were advised what that punishment would be, they might be able to determine appellant's sanity or insanity, but that without such knowledge they would be unable to do so. It certainly would have been improper for the trial court to have aided them in reaching a verdict by any such method or to have instructed them as requested, with that object in view. The trial judge exercised his discretion in discharging the jury. There is no showing of any abuse of such discretion, and his action must be sustained.

The appellant interposed the following objections and challenges to the panel of jurors: (1) That the lists of jurors drawn on May 7, June 5, and June 17, 1908, were not compared and checked in open court with the list previously prepared by the jury commissioners, and that they were not entered upon the journal or certified by the clerk. (2) That the names of E. F. Cormick and W. Castell were drawn from the jury box although the recorded list of jurors previously selected by the commissioners did not include their names. (3) That on June 15, 1908, the court finally discharged the jury. (4) That the names of Leo Ferguson, Frank J. Kent, and Woodson Cummings were drawn in a list of one hundred names ordered by the trial court; that each of their names had been previously drawn on May 9, 1908; that Leo Ferguson and Frank J. Kent had each served as a juror on appellant's former trial, and that Woodson Cummings was examined on the former trial, and excused for cause. No question is raised as to the regularity or validity of the acts and proceedings of the jury commis-

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sioners in selecting and placing names in the jury box, or in the discharge of their duties. It is not suggested that the jurors who tried and convicted the appellant were not competent and qualified; that any of their names had not been originally and properly selected by the commissioners and placed in the jury box, or that they were not afterwards drawn therefrom in obedience to the order of the trial judge. Appellant's objections to the panel appear to be purely technical, reaching only the manner and form of drawing the array. After presenting and reading his written challenge, the appellant offered to introduce proof in its support. The trial judge in denying the challenge and excluding the proof, said:

"There is some of this incorrect probably, but there are some of your points that I think are not well taken. We might as well abolish our courts entirely and give up the trial of cases if we are to literally follow everything in that jury law, and it is almost an impossibility, and we have complied with it as nearly as practicable, and you get a fair jury and if you do, I think that the purpose of the law has been carried out as far as it is practicable."

Appellant contends these irregularities in the drawing of names were fatal, being in violation of the act relating to the selection of jurors, Laws 1905, ch. 146, page 270. We make reference to the act mentioned, but shall not enter upon a detailed statement of its provisions. While they should be observed as closely as practicable so that a competent, impartial and honest jury may be secured, it does not follow that an inadvertent failure to comply with every directory provision will vitiate a panel, unless it is made manifest that some omission prejudicial to the appellant has occurred.

"The manner in which the jury panel shall be drawn is regulated in the different jurisdictions by statutory provisions, which are in most respects merely directory, but which as to their material provisions, designed for securing a fair and impartial jury, must be substantially complied with. . . . The most important requirement is that the panel

shall be drawn and not arbitrarily selected, and any act of this character on the part of the clerk or other officers is ground for challenge to the array." 24 Cyc. 218, 219, and cases cited.

"In some of the states there are decisions to the effect that statutes which prescribe the powers and duties of jury commissioners and corresponding officers to whom is intrusted the selection or drawing of suitable persons as jurors, and which prescribe the time and manner of exercising such powers and performing such duties, are mandatory, and that strict adherence to the statutory requirements is essential to support the regularity and validity of the proceedings. But notwithstanding these decisions the great weight of authority is to the effect that the mere fact that officers intrusted with the several duties prescribed failed to conform precisely to such requirements will not invalidate their action, unless it appears, or may be reasonably inferred from the circumstances, that the complaining party has been prejudiced or that injury has been sustained by reason of neglect or omissions charged. In brief, courts will not sanction a palpable disregard of essential statutory provisions nor overlook material departures therefrom, but if there is a substantial compliance with the statutes, mere irregularities in the procedure, or mere informalities on the part of the officers charged with the selection and drawing, will be deemed unimportant." 12 Ency. Plead. & Prac. 276-8.

There is nothing in the record to show any prejudice against the appellant in the selection of the jury. If the statute had been strictly complied with, the indications are that the identical jurors before whom the appellant was tried would have been chosen, and it has not been made apparent that any of his rights were injuriously affected by the form or manner in which they were actually selected. The record fails to show that any jurors, other than those who served on the first trial, were discharged. It does show that after the appellant had exhausted all peremptory challenges to which he was entitled, the trial judge accorded him an additional one which he used; that a further one was tendered him; that he declined to use it, and that he accepted the

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jury. These additional peremptory challenges accorded him privileges to which he was not entitled under the statute, and in the absence of any showing of prejudice the action of the trial court denying his challenge to the entire panel must be sustained. 1 Thompson, Trials, §§ 33, 34. No palpable abuse of appellant's rights, nor improper conduct of those participating in the trial, or of any other person, has been shown. Nothing in the record warrants any inference of fraud or attempted fraud. The three jurors who had been called for the first trial were subject to challenge for cause, and could have been thus reached without the necessity of a challenge to the array. *State v. Straub*, 16 Wash. 111, 47 Pac. 227; *State v. Krug*, 12 Wash. 288, 41 Pac. 126; *State v. Vance*, 29 Wash. 435, 70 Pac. 34; *State v. Cronney*, 31 Wash. 122, 71 Pac. 782; *Sharp v. United States*, 13 Okl. 522, 76 Pac. 177; *People v. Sowell*, 145 Cal. 292, 78 Pac. 717; *People v. Richards*, 1 Cal. App. 566, 82 Pac. 691; *State v. Ju Nun* (Ore.), 97 Pac. 96.

The appellant has assigned error on a portion of the instructions given by the trial judge on the defense of insanity. The evidence on this defense has not been included in the statement of facts or made a part of the record, as it should have been, to aid us in reaching a correct conclusion on this assignment. We will say, however, that we find no error in the court's instructions on the issue of insanity, as the entire body of the instructions given show that it was fairly and properly submitted to the jury.

The judgment is affirmed.

RUDKIN, C. J., MOUNT, FULLERTON, and CHADWICK, JJ.,
concur.

DUNBAR, GOSE, PARKER, and MORRIS, JJ., took no part.

[No. 7653. Decided August 26, 1909.]

WINNIFRED WOODRING, *by her Guardian Ad Litem*, MARY
WOODRING, *Respondent*, v. P. JACOBINO,
Appellant.¹

INTOXICATING LIQUORS—CIVIL DAMAGE LAW—DEATH—EVIDENCE—SUFFICIENCY. Under either Bal. Code, § 2945, or Laws 1905, p. 120, a saloon keeper is liable to a minor child for the damages sustained by reason of the death of her father, where he sold liquor to the deceased under circumstances which would have led a man of ordinary intelligence to believe that intoxication would probably result, and where deceased became intoxicated and involved in a quarrel and was killed while making a deadly and unprovoked assault upon another; and a finding of damages in the sum of \$400 will not be disturbed where the evidence was conflicting.

Appeal from a judgment of the superior court for Skagit county, Joiner, J., entered March 17, 1908, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action for damages for death resulting indirectly from the sale of intoxicating liquors. Affirmed.

Smith & Brawley, for appellant.

Dave Hammack and *J. P. Houser*, for respondent.

CROW, J.—This action was commenced by Winnifred Woodring, a minor, by Mary Woodring her guardian *ad litem*, against P. Jacobino, to recover damages resulting from the death of Jacob Woodring, plaintiff's father. The complaint alleged that the defendant, a saloon keeper, had sold intoxicating liquors to Jacob Woodring, who drank the same and became intoxicated; that whenever intoxicated he became quarrelsome, vindictive and abusive; that his mind became inflamed, his judgment impaired, and his mental powers deranged; that while intoxicated he became involved in an altercation with one Grosjean, upon whom he made a deadly

¹Reported in 103 Pac. 809.

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and unprovoked assault; that in self-defense Grosjean struck and wounded him causing his death; that Woodring's intoxication had been caused in whole or in part by liquors sold him by the defendant; that by his death the plaintiff was deprived of her sustenance and support, and that she had been damaged thereby. From a judgment in plaintiff's favor, the defendant has appealed.

The assignments of error raise the single question whether the findings are supported by the evidence, and sustain the judgment. The trial court found, that on November 24, 1904, at the town of Hamilton, Skagit county, Jacob Woodring was killed by Grosjean, who was acting in self-defense; that Woodring was 59 years of age, in good health and able bodied; that he was addicted to the excessive use of intoxicating liquors, the effect of which upon his health the court was unable to determine; that respondent, his daughter, was nine years of age; that the appellant was conducting a saloon in Hamilton; that on November 24, 1904, he sold liquors to Woodring from which he became intoxicated; that by reason thereof he became involved in the altercation with Grosjean, upon whom he made a deadly assault; that his intoxication was caused by the liquors purchased from appellant, who sold them to him under circumstances which would have led a man of ordinary intelligence to believe intoxication would probably result therefrom, and that respondent had sustained loss in her support and maintenance in the sum of \$400.

We have carefully examined the evidence and conclude that it is amply sufficient to support these findings, which in turn support the judgment. It is true that there was a considerable conflict of evidence, but the trial court saw the witnesses, heard them testify, observed their demeanor, and passed upon their credibility. This court, being deprived of the advantage thus afforded the trial judge, cannot, from the record, hold that the findings were not supported by a clear preponderance of credible evidence. Some question has

been raised in the briefs as to whether this action is based upon Bal. Code, § 2945 (P. C. § 5728), in force at the date of Woodring's death, or the amendment of that section, Laws 1905, p. 120, ch. 62, in force at the date of trial. The inquiry is an immaterial one, as the facts proven were sufficient to sustain respondent's recovery under either section.

The judgment is affirmed.

RUDKIN, C. J., DUNBAR, MOUNT, FULLERTON, and CHADWICK, JJ., concur.

[No. 7724. Decided August 26, 1909.]

J. N. OTTO, *Appellant*, v. E. I. GRIFFIN *et al.*, *Respondents*.¹

ACTIONS—ACCRUAL—TAKING NOTE FOR DEBT—FRAUD OF DEBTORS. The acceptance of promissory notes for the amount of open accounts, suspends the right of action on the accounts until the maturity of the notes, even though they were not taken in payment; and action on the accounts as past due is premature, notwithstanding a reply setting up fraudulent acts of the defendants that would have authorized attachments, under Bal. Code, § 5352, in case the complaint had alleged that the debt was not due and that nothing but time was wanting to fix an absolute indebtedness.

Appeal from a judgment of the superior court for King county, Tallman, J., entered September 23, 1908, upon granting defendant's motion for judgment on the pleadings, dismissing an action for goods sold and delivered. Affirmed.

James M. Gephart and *Charles R. Crouch*, for appellant.

F. A. Gilman, for respondents.

CROW, J.—Action by J. N. Otto against E. I. Griffin, Laura W. Griffin, his wife, and F. M. Blake, for goods sold and delivered. The plaintiff alleged that the defendants E. I.

¹Reported in 103 Pac. 789.

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Griffin and F. M. Blake were copartners conducting a hotel in Snohomish county; that plaintiff and his assignor, one William Kingdon, had sold the partnership goods and supplies for use in their business, and that they had not paid for the same. The complaint stated two causes of action, one for the goods sold by the plaintiff, and the other for the goods sold by his assignor, William Kingdon. The defendant Blake defaulted. The defendants Griffin and wife answered separately, the latter denying the allegations of the complaint. The defendant E. I. Griffin by his answer admitted the sales, but alleged that he and his partner F. M. Blake had executed and delivered to the plaintiff and to William Kingdon, their promissory notes in full payment and settlement of the amounts severally due for the goods so sold; that the notes had not yet matured, and that the action was premature. By his reply the plaintiff admitted the execution and delivery of the notes; that they were not due; denied that they had been given in full payment and settlement of the accounts; and alleged that they had been received by the plaintiff and his assignor, William Kingdon, as evidence of the indebtedness at the time existing in their favor; that they were held solely for that purpose; that plaintiff tendered them into court for cancellation; that the notes were unsecured; that after giving them the defendants E. L. Griffin and Laura W. Griffin absconded and concealed themselves, and that they did surreptitiously take with them all the assets of the copartnership, with intent to defraud the plaintiff. When the cause was called for trial, the defendant moved for judgment of dismissal on the pleadings. This motion was granted, the action was dismissed, and the plaintiff has appealed.

The sole question presented is whether the action was prematurely commenced. The complaint is on open accounts, making no mention of the notes, or any alleged fraudulent acts of the respondents. It is conceded that the original indebtedness was the sole consideration for the notes, and that

the notes were not due when this suit was brought. Appellant insists that the notes were not taken in payment, but only as evidence of the original indebtedness which still exists; that when, as alleged in the reply, the respondents E. I. Griffin and Laura W. Griffin absconded, secreted the partnership property, and attempted to defraud the appellant, he was entitled to ignore the notes and immediately sue for the original debt. In support of this contention, he has cited authorities to show that a note taken for a pre-existing debt does not necessarily constitute payment, and that the creditor may, at his election, sue for the original debt. While it is true that many authorities so hold, the further doctrine is well established that, by accepting a note the creditor extends, until the maturity of the note, the debtor's time for making payment of the original debt. Acceptance of a debtor's promissory note does not operate as payment of an antecedent debt which constitutes its consideration, unless it is so stipulated by agreement of the parties, express or implied, but the right of action on the original debt is thereby suspended until the date of the maturity of the note. *Lane & Bodley Co. v. Jones*, 79 Ala. 156; *Happy v. Mosher*, 48 N. Y. 313; *Wenzel v. Primm* (Cal.), 91 Pac. 754; *Smith v. Owens*, 21 Cal. 11. This rule is recognized by the following authorities cited by the appellant: *Fry v. Patterson*, 4 N. J. L. 612, 10 Atl. 390; *Jagger Iron Co. v. Walker*, 76 N. Y. 521.

"Although a note given by a debtor to his creditor does not operate as a payment of the precedent indebtedness, it will generally have the effect of suspending all right of action against the debtor on such precedent indebtedness until the maturity of the note." 22 Am. & Eng. Ency. Law (2d ed.), p. 566.

In *Lane & Bodley Co. v. Jones*, *supra*, the supreme court of Alabama said:

"Generally, the acceptance of the note of a debtor is not, *prima facie*, payment of an antecedent debt. To operate an extinguishment of the original indebtedness, the note must, by agreement of the parties, express or implied, be received

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in payment. A contractor may accept, in consideration of the materials furnished, the note of the owner or proprietor of the land, as a convenient mode of liquidating the account, without waiving the lien. The original indebtedness is not thereby extinguished, *but the right of action is suspended until the maturity of the note*. After maturity, the note being unpaid, he may bring suit on the original indebtedness, and surrender the note."

In *Happy v. Mosher, supra*, the commission of appeals of New York, in discussing a note so given and in addressing itself to this question, said:

"It did not operate as payment of the debt for which it was given, . . . it extended the time of payment of the debt until the note matured. Such is always the effect of a note upon time for an antecedent debt, and here there is no proof even that the parties agreed or understood that it should not have this effect. The plaintiff could not take and hold this note, and secretly, in his own mind, intend that it should have no effect. Until this note matured, therefore, the plaintiff could not sue Caler for the debt, and he could not institute the proceedings before the county judge to enforce its collection. . . . The proceeding before the county judge was, therefore, prematurely instituted, and the plaintiff should have been nonsuited. There was nothing in reference to this question to be submitted to the jury."

Appellant seems to base some contention on the alleged fraudulent acts of respondents E. I. Griffin and Laura W. Griffin, set forth in the reply. Such acts might have entitled him to an attachment under Bal. Code, § 5352 (P. C. § 512), prior to the maturity of the debt, provided he had filed a proper complaint to support the same, in which he should have alleged that the debt was not due, that nothing but time was wanting to fix an absolute indebtedness, and that one or more of the four grounds for attachment mentioned in § 5352 existed. The appellant did sue out an attachment, but the record shows that it was obtained on an indebtedness past due, under the provisions of Bal. Code, § 5351 (P. C. § 511), and not under § 5352, *supra*, for a debt not due. This action

is not predicated on the respondents' fraudulent acts. It is based upon open accounts which the complaint alleged to be due at the time of the commencement of the action, but which are shown, by other admitted allegations of the pleadings, not to have been due by reason of the extension of time of payment, which the appellant and his assignor granted by accepting the notes. The action was prematurely commenced and was properly dismissed. The dismissal, however, is necessarily without prejudice to the right of the appellant to commence another action, either upon the note or the accounts after their maturity.

The judgment is affirmed.

RUDKIN, C. J., DUNBAR, MOUNT, FULLERTON, and CHADWICK, JJ., concur.

[No. 7745. Decided August 26, 1909.]

CHARLES H. HULET *et al.*, Respondents, v. WISHKAH BOOM COMPANY, Appellant.¹

APPEAL—REVIEW—OBJECTIONS NOT MADE BELOW. In the absence of a demurrer, and of the evidence, objection to the sufficiency of the complaint will not be considered on appeal.

NAVIGABLE WATERS—OBSTRUCTIONS—INJUNCTIONS—PARTIES ENTITLED TO SUE. Riparian owners on a navigable stream, whose means of ingress and egress to and from their lands is totally obstructed by a boom company, are entitled to maintain an action to enjoin the obstruction, although it may be a public nuisance.

SAME—PARTIES LIABLE. An order compelling a boom company to remove a boom and clear away logs and jams in a river, is warranted, notwithstanding that the acts of loggers were claimed to have caused the obstructions, where it appears by the findings that the boom company contracted with loggers for the use of its splash dams, whereby logs were driven down the stream by artificial freshets, a toll being paid to the company for such drives, that the log jams and injury to riparian owners resulted therefrom, that more logs were driven down than could be handled by the company's

¹Reported in 103 Pac. 814.

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boom, and that the loggers placed a boom across the river to hold such accumulations, which boom the company opened from time to time and replaced; since the loggers are shown to be so closely connected with the company as to be either its servants or joint tortfeasors.

SAME—RIPARIAN OWNERS—RIGHTS ON TIDE WATERS. The objection that riparian owners on a tide water stream have no riparian rights of ingress and egress by reason of the state's ownership of intervening tide lands, does not go to their right to an injunction to prevent artificial freshets whereby their uplands are damaged and washed away, and logs deposited thereon, or to prevent unnecessary interference with the public right of navigation on the stream.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered July 2, 1908, upon findings in favor of the plaintiffs, enjoining the maintenance of obstructions placed in a navigable river, ordering the removal thereof, and awarding damages, after a trial on the merits before the court without a jury. Affirmed.

Morgan & Brewer and W. H. Abel, for appellant.

Elmer E. Shields and W. I. Agnew, for respondents.

CROW, J.—Action by Charles H. Hulet and Maggie Hulet, his wife, against the Wishkah Boom Company, a corporation, to enjoin the defendant from so operating its splash dams and boom as to obstruct navigation of the Wishkah river and injure respondents' lands, and to recover damages. From a judgment and decree granting an injunction and awarding damages, the defendant has appealed.

The case comes to this court on the pleadings, and the findings made by the trial court. The assignments of error present the single question whether the respondents are entitled to the injunctive relief, and the damages awarded. The sufficiency of the complaint is challenged, but the record does not show that the appellant attacked it by demurrer. This being true, we will, in the absence of the evidence which might have amplified and aided the complaint, confine ourselves to the single question whether the findings support the judgment and decree.

The trial court found, that respondents are the owners in fee simple of lands located on the westerly bank of the Wishkah river; that said river is a navigable, meandered stream and public highway, being respondents' means of ingress to and egress from their lands, which reach its meandered line; that the appellant corporation is carrying on its business as a boom and driving company on the river, in which it has constructed a logging boom, below respondents' land, for catching, holding, and sorting logs; that its boom has been approved by the war department of the United States, and is not in itself an unreasonable hindrance to navigation; that appellant has also constructed and maintained above respondents' land, and above the influence of the tide, three large splash dams, and authorized their use by certain loggers to create artificial freshets and drive logs down the river to appellant's boom; that the river is influenced by the tide and is navigable in fact for a distance of about fifteen miles above its mouth; that respondents' lands are about ten miles above its mouth, and are located between appellant's boom and the splash dams; that the river above the influence of the tide carries and maintains an insufficient supply of water to float and drive logs to the appellant's boom; that for three years certain loggers have deposited timber products in the river above and below respondents' land, all consigned to appellant's boom; that for the purpose of securing the driving of logs to its boom, appellant entered into a contract with the loggers whereby it authorized them to use the splash dams for creating artificial freshets; that by the terms of the contract such use was to be considered a driving of the logs by appellant, it receiving a stipulated toll therefor, and paying some of the employees who operated the dams; that under this agreement large volumes of water were collected and stored by the dams, and under the loggers' directions were suddenly released about three times a week, to create artificial freshets and drive logs; that the logs were thus driven

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in such large quantities that immense jams and drifts formed in the river channel and obstructed its navigation above appellant's boom; that logs were deposited in the river, some above and others below the splash dams; that those deposited above were driven by artificial freshets through the gates of the dams, and with others deposited below the dams would, by floating on the incoming tide, return up the river; that when the tide receded, some would lie in jams in the river-bed, while others, returning with the tide, would block the landings of certain loggers located below respondents' lands; that such loggers for their own convenience placed a boom stick across the river below respondents' land and above appellant's boom, to prevent the obstruction of their landings; that appellant allowed the boom stick to remain as an obstruction across the river and hold the logs coming down from above; that when logs were needed in its boom, it would from time to time open the boom stick and allow them to float down; that it then replaced or closed the boom stick, and that by reason of the location of the boom stick across the river large jams of logs were maintained in the river above the same; that the boom stick and appellant's splash dams so operated by the loggers under their arrangement with appellant, did for three years cause a total obstruction of navigation and prevent the respondents from using the stream as a highway to and from their lands; that artificial freshets produced by the operation of the splash dams washed away lands of the respondents abutting the stream to the extent of one acre, in addition to loss from natural erosions, to their damage in the sum of \$200; that the artificial freshets also caused a large number of logs to float out of the channel of the stream and to remain where deposited upon respondents' cultivated lands, to their further damage in the sum of \$50, and that such damages were caused by acts of the appellant in permitting the loggers to drive more timber products down the stream than it could care for in its boom.

Upon these findings a final judgment was entered whereby it was ordered, that the appellant be enjoined from placing and maintaining in the water of the river between its mouth and the respondents' lands any saw logs or timber products which will, *in any unreasonable manner*, impede or obstruct the navigation of the river by respondents, as a highway; that appellant be commanded to remove, abate, and clear away any logs, timber products or other obstructions which exist in the river between respondents' lands and the mouth of the river, so as to unnecessarily interfere with or prevent its navigation by respondents; that appellant be restrained from operating its splash dams so as to create such unnatural freshets as will damage respondents' land by overflowing the same, or depositing logs thereon, or causing the lands to be eroded and washed away, and that respondents recover \$250 damages and costs.

Appellant's first contention is that obstructions to the respondents' navigation of the river, if they existed, were a public nuisance, the continuance of which could not be abated by an injunction obtained in an action maintained by a private individual; that respondents as private individuals cannot maintain this action for the reason that they are similarly situated with many others upon the river, and fail to allege special injury to themselves. The trial court found that the river was the highway which constituted the respondents' means of ingress and egress to and from their lands. It does not appear from the findings that they did or did not have any other highway, but it does appear that they had this one which was totally obstructed. This finding establishes the fact that the respondents were specially injured, which fact entitled them to maintain an equitable action to enjoin the appellant from causing the obstructions. *Carl v. West Aberdeen Land & Imp. Co.*, 13 Wash. 616, 43 Pac. 890; *Smith v. Mitchell*, 21 Wash. 536, 58 Pac. 667, 75 Am. St. 858; *Dawson v. McMillan*, 34 Wash. 269, 75 Pac. 807.

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Mr. Farnham, in vol. 1 of his work on Waters and Water Rights, § 85a, says:

"Regarding the obstruction of the stream as a public nuisance it necessarily follows that to enable an individual to maintain an action he must show a special injury to himself, different in kind from that suffered by the public at large. But the owner of a wharf or other improvement on a stream does suffer an injury different in kind from that suffered by the public when the value of his wharf is destroyed by the closing of the stream. Furthermore, a nuisance may be both public and private. And the closing of a stream may be a public nuisance so far as it interferes with the public right of navigation, and a private nuisance to owners of land along the bank whose navigation rights are thereby cut off."

In *Dawson v. McMillan*, *supra*, it was found that a certain navigable slough, extending from lands of the plaintiff to Bellingham Bay, subject to the ebb and flow of the tide, was used by the plaintiffs and other loggers in carrying their timber products to market; that the plaintiffs had no other feasible or practicable way to carry their timber to market; and that the navigation of the slough was obstructed by the defendant. This court, in passing upon the identical question now raised by the appellant, said:

"Appellants' last position is based upon the claim that the United States is the only party having a right to prevent the obstruction, and that respondents are not injured until they are denied free passage. It has been frequently held by this court that, where, by a public nuisance, a private party is specially damaged, his damage differing in kind and degree from that of the general public, he may maintain an action to abate such nuisance. *Carl v. West Aberdeen Land Co.*, 13 Wash. 616, 43 Pac. 890; *Smith v. Mitchell*, 21 Wash. 536, 58 Pac. 667, 75 Am. St. 858; *Griffith v. Holman*, 23 Wash. 347, 63 Pac. 239, 54 L. R. A. 178, 83 Am. St. 821; *Sultan W. & P. Co. v. Weyerhaeuser Timber Co.*, 31 Wash. 558, 72 Pac. 114; 21 Am. & Eng. Ency. Law (2d ed.), p. 444. By findings Nos. 4, 5, and 7, it is shown that respondents are specially damaged, and also that the obstruction exists, and that respondents are prohibited from using the highway and from removing their timber products to market."

It does not appear, nor has it been found, that the appellant is not keeping a portion of the channel of the river open along the side of its boom, as required by law, but it does appear that the operations above its boom, conducted by it, and through the medium of the splash dams operated by loggers with whom it has an agreement, are causing obstructions to navigation. These acts which interfere with the respondents' use of a public highway ordinarily affording them ingress to and egress from their lands, may be enjoined in an action prosecuted by them.

Appellant complains of the order commanding it to remove, abate, and clear away the logs and other timber products which create jams, drifts, and obstructions in the river and interfere with its navigation by respondents. It insists that the findings are not broad enough to establish the fact that its boom or splash dams have caused such obstructions, but that the findings do show that they were caused by loggers over whom appellant has no control, who deposited the timber products in the stream, constructed the boom stick, and operated the splash dams. We think the findings show these acts to have been performed by the loggers under appellant's direction and control. The situation disclosed by the findings, indicates that the appellant's boom has not sufficient capacity to collect, store and care for all the logs consigned to it, and that instead of properly enlarging its boom and keeping the river open for navigation, it has endeavored to detain the logs by use of the boom stick which the loggers placed in the stream. The appellant could prohibit the loggers from using its splash dams to such an extent as will prevent the driving of more logs than it can care for in its boom. The findings show the appellant to be so closely identified with the loggers in these operations upon the river, that if the latter are not its servants or employees, they are at least joint tortfeasors with appellant, making them and appellant jointly or severally liable.

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The appellant, citing *Eisenbach v. Hatfield*, 2 Wash. 236, 26 Pac. 539, 12 L. R. A. 632, and *Van Siclen v. Muir*, 46 Wash. 38, 89 Pac. 188, decided by this court, insists that respondents have no riparian or littoral rights on the stream, as it is subject to the ebb and flow of the tide, and that the tide lands belonging to the state lie between the natural stream and respondents' upland. The respondents in common with the public have the right to use the stream for navigation. It is the highway affording their means of ingress and egress, and its obstruction especially injures them. It cannot be seriously contended that the appellant, by its operations on the river, can wash away respondents' uplands or deposit obstructions on their cultivated lands, on the theory that they have neither riparian nor littoral rights. Their uplands having been injured and damaged, they were entitled to the injunction and damages granted, even though the state does own tide lands between their uplands and the navigable stream. Were the appellant to purchase the tide lands, such purchase would not confer upon it the right to destroy and injure respondents' uplands on the theory that they have neither riparian nor littoral rights, nor would it relieve the appellant from liability for unnecessarily interfering with the public right of navigation over the highway which affords respondents ingress to and egress from their lands.

The judgment is affirmed.

RUDKIN, C. J., DUNBAR, MOUNT, PARKER, FULLERTON, and CHADWICK, JJ., concur.

[No. 7763. Decided August 26, 1909.]

THE CITY OF SEATTLE, *Respondent*, v. ALPHEUS BYERS *et al.*,
Appellants.¹

EMINENT DOMAIN—NECESSITY FOR STREETS—DETERMINATION BY CITY COUNCIL. The city council is the proper authority for deciding the necessity of condemning land for a public street.

SAME—CONDEMNATION FOR STREETS—PUBLIC USE. When the city council has determined by ordinance that the taking of certain property is necessary for the purposes of a public street, and directed its condemnation, the court must find that the taking is for a public use, although Const., art 1, § 16, makes the question a judicial question only.

SAME—DAMAGES—EVIDENCE—REMOTENESS. In condemnation proceedings of a strip of land between a street and a cul de sac, evidence of the value which the land would have if the cul de sac should be vacated in the future, is inadmissible on the subject of damages, being too remote and speculative.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered April 10, 1908, adjudging a public use and awarding damages for land taken in condemnation proceedings, after a trial before the court and a jury. Affirmed.

Byers & Byers and McBurney & Cummings, for appellants.
Scott Calhoun and Howard A. Hanson, for respondent.

CROW, J.—This action was commenced in the superior court of King county, by the city of Seattle against Alpheus Byers and others, to condemn certain real estate for a street. The court adjudged a public use; damages were awarded by a jury; judgment was entered thereon, and the defendants have appealed.

The appellants contend that the trial court erred (1) in excluding evidence offered for the purpose of showing that the land was not being condemned for a public use; (2) in

¹Reported in 103 Pac. 791.

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holding that the condemnation was for a public use; and (3) in excluding evidence offered by appellants to show value.

Several years prior to the commencement of this action, the city of Seattle condemned a strip of land sixty-six feet wide, through lots owned by appellants, for the opening of a street called Seventh avenue north, such street running north and south. After the condemnation, appellants had remaining of their lots a strip of land to the west of this street about eight feet wide, east and west, by one hundred and twenty feet long, north and south; that west of this strip and contiguous thereto was a short street known as Seventh avenue, running north and south for about one hundred and twenty feet in the form of a *cul de sac*, and opening on Highland drive, which running east and west intersected it, and also intersected Seventh avenue north. It will thus be seen that the *cul de sac* known as Seventh avenue was only separated from Seventh avenue north by the eight-foot strip of land belonging to appellants. The record shows that the city is in this action attempting to condemn the strip of land so as to consolidate the *cul de sac* with Seventh avenue north, thereby making the latter wider at this point by about sixty-eight feet than it will be at any other. Appellants contend that from this situation it becomes manifest that the strip of land sought to be taken is not needed for street purposes, that it is not in fact being taken for any such purpose, and that the use for which it is being taken is not public. The city council by ordinance determined that the strip was necessary for a public use as a street, and ordered its condemnation therefor. In taking this action it, as the proper authority, decided the necessity for opening the street and taking the land. While it is true, as appellants contend, that the question whether the contemplated use of the property is public is a judicial question only, under § 16 of art. 1 of the state constitution, this court has held that the use of property for a street or a highway is necessarily public, and the trial court

could not have held otherwise: *State ex rel. Schroeder v. Superior Court*, 29 Wash. 1, 69 Pac. 366; *State ex rel. Thomas v. Superior Court*, 42 Wash. 521, 85 Pac. 256.

When the trial court found the fact to be that the city council, in the lawful exercise of its legislative functions, had passed an ordinance authorizing and directing the condemnation of the land for use as a street, it then properly and judicially determined and found that the proposed taking was for a public use.

Appellants further contend that the trial court erred in excluding evidence offered by them to show the value of the land taken. They attempted to show that, if the *cul de sac* known as Seventh avenue should at some indefinite time in the future be vacated by the city, appellants' land would become much more valuable, as they would then, by reason of their present ownership, secure additional property now included in the *cul de sac*. This evidence was speculative, being based upon the remote possibility of a future occurrence, and could not properly be considered in estimating value.

We find no prejudicial error in the record. The judgment is affirmed.

RUDKIN, C. J., DUNBAR, MOUNT, FULLERTON, and CHADWICK, JJ., concur.

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Opinion Per CHADWICK, J.

[No. 7345. *En Banc*. August 26, 1909.]

W. S. McCREA *et al.*, *Respondents*, v. WALTER OGDEN *et al.*,
Appellants.¹

FRAUDS, STATUTE OF—SALE OF REAL ESTATE—MEMORANDUM—SUFFICIENCY—CONTRACT FOR COMMISSIONS—BROKERS. The words "Commission to be paid when 2d payment is made to M. & M., \$625," after the signature of a vendor at the foot of a contract to purchase real estate, is not a sufficient memorandum of the agreement, within Laws 1905, p. 110, providing that an agreement for a broker's commission on the sale of real estate shall be void unless the contract or some note or memorandum thereof shall be in writing, and signed by the party to be charged therewith, or some person thereunto by him lawfully authorized (overruling, on rehearing, *Id.*, 50 Wash. 495).

Appeal from a judgment of the superior court for Spokane county, Poindexter, J., entered March 25, 1908, in favor of the plaintiffs, upon overruling a demurrer to the complaint, in an action on contract. Reversed.

Post, Avery & Higgins, for appellants.

Danson & Williams, for respondents.

ON REHEARING.

CHADWICK, J.—The statute of frauds, governing contracts for commissions for buying or selling real estate, is as follows:

"In the following cases, specified in this section, any agreement, contract and promise shall be void, unless such agreement, contract or promise, or some note or memorandum thereof, be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized, that is to say: . . . (5) An agreement authorizing an employee, an agent or broker, to sell or purchase real estate for compensation or a commission."

In the former opinion (50 Wash. 495, 97 Pac. 503), after quoting the memorandum relied on, "Commission to be paid

¹Reported in 103 Pac. 788.

when 2d payment is made to McCrea & Merryweather \$625," and a part of the second amended complaint, in which the completion of the sale is alleged, and that it was brought about by the efforts of respondents, it is said:

"Appellants contend that the transaction is within the statute of frauds governing contracts to pay for services for buying or selling real estate, as set forth in the Laws of 1905, page 110; that the words at the end of the contract do not constitute a compliance with the statute mentioned. We think they do constitute a substantial compliance. These words show the fact that a commission was to be paid, when it was to be paid, to whom it was to be paid, and the amount that was to be paid. But it is urged by appellants that it does not state who was to pay this commission. With the contract before him, we cannot see how it would not be clear to any one that the intention was that the signers of the contract, the vendors, should pay this commission. It is true that a purchaser sometimes pays a commission, but this is the exception and not the rule. When we speak about a real estate sale and a commission being paid, we ordinarily understand, unless there is specific mention to the contrary, that it is the vendor who pays the commission. This contract was signed by the vendors only, and we think there could be no possible mistake or misunderstanding as to who was to pay the commission that is provided for in this memorandum."

It is also said: "The statute in question does not require the agreement to be in writing."

Upon rehearing, a majority of the court are unable to concur in these conclusions. To sustain them the court must assume, as it seems to have assumed in the original opinion, that because, as it is said, the seller most frequently pays the commission, the unsigned memorandum binds the appellants to pay the commission in this case. The court seems to have unwittingly supplied the requirement of the statute by quoting and relying upon a part of the complaint. Whether the seller most frequently pays the commission in a real estate transaction may or may not be so. But, whatever the fact may be, it is something with which the court can have nothing whatever to do. It is enough for us to know that either the

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purchaser or seller may contract to pay the commission, and we cannot look beyond the contract itself to fix the liability, for the law has said that the contract must be in writing. We cannot assume that some one is liable and, in the absence of a recital to the contrary, presume that the seller is to be bound. The statute quoted requires certainty, to the end that frauds and impositions may be prevented, and its application cannot be arrested because in a given case—as for instance in this one—the broker has probably rendered an honest service for which he should in good conscience be paid.

There is nothing in the contract to show who respondents' principals were. The contract is in an ordinary form. The Ogdens agreed to sell and Conroy agreed to buy and, although "signed by the vendors only," the principal contract was "made" by both parties; and if we are to presume anything in the teeth of the statute of frauds, it would seem that the court should have assumed that the contract was mutually beneficial and bound both parties to pay the commission. But the purpose of the law was to remove all doubt, and in doing so no injustice was done the broker, for it is always within his power to make the contract or memorandum certain in every particular, including the party to be bound, which, notwithstanding the expression in the former opinion to the contrary, we regard as the first essential of the law; which element, if proven in this case, would necessitate a resort to parol testimony. In *Forland v. Boyum*, 53 Wash. 421, 102 Pac. 34, following *Foote v. Robbins*, 50 Wash. 277, 97 Pac. 103, and *Keith v. Smith*, 46 Wash. 131, 89 Pac. 473, in construing this same statute, we held that the terms of the contract must appear from the writing itself, and that parol testimony could not be received to ascertain the amount agreed on as a commission. In *Mead v. White*, 53 Wash. 638, 102 Pac. 753, the court said, in construing a contract involving the principles here presented:

"In order to hold the respondents to any liability, the court would be required to create a contract, either by con-

struction or by parol evidence. There is no language in the contract to warrant the former, and the latter is within the prohibition of the statute."

It would seem to follow as an inevitable conclusion that parol testimony should not be received for the purpose of identifying the party to be charged, when the statute has said that his promise to pay shall be in writing and signed by him.

A majority of the court believing that this case falls within the rule of the cases just cited, the former opinion is overruled, and the case remanded with instructions to the lower court to sustain the demurrer to the second amended complaint.

RUDKIN, C. J., FULLERTON, GOSE, CROW, and PARKER, JJ., concur.

[No. 7937. Department Two. August 26, 1909.]

LUCY COLLINS *et al.*, Respondents, v. HAZEL LUMBER
COMPANY, Appellant.¹

CORPORATIONS—ACTIONS AGAINST—VENUE—ADMISSIONS AFFECTING —"DOING BUSINESS." An allegation in a complaint that the defendant is a domestic corporation "doing business" in the county of the venue, admitted by the answer, is sufficient to confer jurisdiction upon the court of that county; although the president was served in another county, and Bal. Code, § 4854, requires actions against a corporation to be commenced in any county where it "has an office for the transaction of business," or where any person resides upon whom service could be made.

NEGLECT—PREMISES—INVITATION TO USE—RIGHT TO THE LAND —WAY AROUND OBSTRUCTIONS. One who obstructs a public road, and builds a road around the obstruction upon the lands of another, thereby invites the public to travel thereon; and he is not relieved from liability for negligence in failing to provide a reasonably safe way by the fact that he had no right on the land, and that travelers thereon would be trespassers.

¹Reported in 103 Pac. 798.

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Opinion Per MOUNT, J.

APPEAL—REVIEW—VERDICT—DEATH—CAUSE. The verdict of a jury upon conflicting evidence as to whether a death was caused by the bad condition of a road or the intoxication of the deceased, is conclusive on appeal.

APPEAL—REVIEW—HARMLESS ERROR. The refusal to strike out hearsay evidence of no importance to the case is not prejudicially erroneous.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered June 17, 1908, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for the death of a traveler upon a defective highway. Affirmed.

Rose & Craven, Bell & Austin, and Dorr & Hadley, for appellant.

E. C. Dailey, for respondents.

MOUNT, J.—The plaintiffs recovered a judgment in the court below on account of the death of Alfonzo Collins, husband of the plaintiff Lucy Collins, and father of the two minors named. The defendant appeals from that judgment.

It appears that in the month of August, 1907, the servants of appellant cut down two large trees. These trees were felled across a county highway leading from Darrington to Arlington, in Snohomish county. Thereupon the appellant caused a road to be constructed around these trees. This road was constructed upon private property not belonging either to the appellant or to Snohomish county. On August 29, 1907, Alfonzo Collins, in company with one James Stevens, while traveling on the county highway with a wagon and team of horses, came upon these trees across the highway. Upon examination they discovered the way around the obstruction, which way had been constructed as above stated. They saw that this way had been used by other wagons and they attempted to use it. While doing so, the wagon was overturned and Alfonzo Collins was killed, and this action was subsequently brought. The appellant and Snohomish county were

originally made parties defendant. The summons and complaint were served on the president of the appellant company personally in Whatcom county. Subsequently by a stipulation Snohomish county was dismissed from the action, and an amended complaint was filed in which it was alleged that the appellant "was and is now a corporation organized under and by virtue of the laws of the state of Washington, and doing business in Snohomish county." The appellant appeared in the action and demurred to this complaint, upon the grounds that the court had no jurisdiction of the subject-matter, no jurisdiction of the person of the appellant, and that the complaint did not state facts sufficient to constitute a cause of action against the defendant. This demurrer was overruled and appellant answered, but did not deny that it was a domestic corporation doing business in Snohomish county. When the case came on for trial to the court and a jury, appellant again objected to the introduction of any evidence, for the reason that the court had no jurisdiction either of the subject-matter or of the corporation. This objection was also overruled.

Upon this appeal counsel now argue that because the complaint does not show that the appellant "*has an office*" in Snohomish county, and because it is shown by the return of service of the summons and complaint that the president of the appellant company was served in Whatcom county, that, under the rule of the statute, Bal. Code, § 4854 (P. C. § 310), in force at the time the action was begun, the court had neither jurisdiction of the subject-matter nor of the person of the appellant. The statute provides, "An action against a corporation may be brought in any county where the corporation has an office for the transaction of business, or any person resides upon whom process may be served against such corporation." And it was held in *McMaster v. Advance Thresher Co.*, 10 Wash. 147, 38 Pac. 670, that where the action was not brought in the county where the corporation has an office or where some person resides upon

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whom service may be made, the court has no jurisdiction to enter a judgment. This rule was followed in *Hammel v. Fidelity Mut. Aid Ass'n.*, 42 Wash. 448, 85 Pac. 35, and later in *Whitman County v. United States Fidelity & Guaranty Co.*, 49 Wash. 150, 94 Pac. 906. In these cases it affirmatively appeared that neither condition existed. In the case at bar it is alleged and is admitted that the appellant is a domestic corporation "and doing business in Snohomish county."

While this allegation does not say specifically that the corporation "has an office for the transaction of business" in Snohomish county, or that any person upon whom process may be served resides in that county, a liberal construction, which must be given to the language used, is manifestly equivalent to saying that the appellant has an office in Snohomish county. Appellant says that a corporation may have an office in one county and may do business in another county, which is no doubt true; but where it is alleged and admitted that a corporation is a domestic corporation "doing business in Snohomish county," the inference is clear that its principal office is located there, and this is sufficient to show jurisdiction in the courts of that county. If the fact were otherwise, it would have been a very easy matter to have shown, and thus brought the case within the rule of the cases above cited. This was not done. The appellant appeared generally in the case and went to trial without showing, or attempting to show, that an office was not maintained in Snohomish county; and there is nothing now in the record bearing upon the question except the admission that the appellant is doing business in Snohomish county, and except the president of the company was personally served with process in Whatcom county; but this fact does not necessarily show that the president resided in Whatcom county, or that the corporation did not maintain an office at the place where it was doing business. We think the presumption must be, in the absence of any showing to the contrary, that the principal office of the

corporation is at the place where it is doing business. It is true that the legislature, since the trial of this case, has amended Bal. Code, § 4854 (P. C. § 310), by providing that an action against a corporation may be brought in any county where the corporation transacts business. Laws 1909, p. 69. While this amendment may infer that an office may be maintained in one county and business transacted in another, yet the allegation and admission above referred to, aided by liberal construction, must mean that an office is maintained where business is transacted. We think the allegations of the complaint were, therefore, sufficient to confer jurisdiction upon the court of Snohomish county.

Appellant argues that the court erred in instructing the jury upon the question of invitation to travel over the way around the obstruction on the public highway. The instruction given is as follows:

"By an invitation to travel over a road is not meant a formal invitation. It is not necessary to show that they told anybody they could go over the road or that they published any notices that people could go over the road, but you have a right to take into consideration all the surrounding circumstances and, from those circumstances, determine whether it was intended that this particular road should be used by the public. If the circumstances were such that the ordinarily intelligent and observing person would believe, from the circumstances and what he could see, that it was intended that this road was to be used by people travelling along the county road to get around an obstruction in the county road, then that is sufficient to show an invitation. In considering that matter you would have a right to take into consideration whether or not the public road, at or near this place, was obstructed by the defendant and, from it all, say whether or not the circumstances were such as would lead the ordinarily intelligent and observing person to believe that this road was intended to be used by the public in going around this obstruction in the public highway, and, if you should so find, then that would be, in the law, an invitation to travel upon the road."

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It is argued that this instruction is erroneous because it eliminates the idea that the appellant had the power or legal right to hold out an invitation to cross private lands of others. It may be the rule that one may not legally invite a trespasser upon the lands of another so as to make that other liable for an injury to the trespasser. But that is not this case. Here the appellant obstructed a public highway. Appellant thereupon went upon adjoining land and constructed a way around the obstruction. The foreman who constructed the way testified that he intended that persons traveling the public highway should use the way around the obstruction. The way itself was of course an implied invitation to use it. The mere fact that the appellant was a trespasser as to the owner of the land, or that persons traveling over the way were trespassers as to the true owner, did not make such persons trespassers as to the appellant. As between the appellant and persons lawfully upon the highway the appellant, under the conditions shown, was as clearly liable to his invitees as though it owned the land; this proposition is elementary. After appellant has invited persons upon premises not its own, it cannot be heard to say to its invitees, who did not know the fact, I had no legal right to invite you there, and am therefore not liable for my negligence in not maintaining a reasonably safe place for you. The instruction is therefore not subject to the criticism urged against it.

It is next argued that the verdict was contrary to the evidence. The evidence is conflicting as to whether the deceased was killed by reason of the bad condition of the road, or whether he fell out of the wagon by reason of his own negligence, or by reason of intoxication. These questions were for the jury, and the jury's finding is conclusive upon them. A question is raised upon the refusal of the court to strike out certain evidence alleged to be hearsay. We do not regard this

matter as being sufficiently prejudicial to warrant a reversal, because it was of no special importance to the case.

We find no error in the case, the judgment must therefore be affirmed.

RUDKIN, C. J., DUNBAR, PARKER, and CROW, JJ., concur.

[No. 7773. *En Banc*. August 26, 1909.]

THE STATE OF WASHINGTON, *on the Relation of I. Hulme et al., Relators, v. GRAYS HARBOR AND PUGET SOUND RAILWAY COMPANY, Respondent.*¹

NAVIGABLE WATERS—COMMERCE—LANDS UNDER WATERS—HARBOR AREAS—LEASES—RAILROAD PURPOSES. The provision in Const., art. 15, § 1, that the harbor area shall never be sold or granted but shall be reserved for "landings, wharves, streets and other conveniences of navigation and commerce," has reference to commerce both by land and water, as "navigation" is not used in a restrictive sense; hence, under art. 15, § 2, authorizing the leasing for terms not exceeding thirty years, of the right to build on the harbor area "wharves, docks, and other structures," the state may lease the right to build a railroad on the harbor area; "other structures" in section 2 being equivalent to "other conveniences" of commerce in section 1 (RUDKIN, C. J., MOUNT, DUNBAR, and CROW, JJ., dissenting).

EMINENT DOMAIN—NECESSITY—OBJECTIONS—CROSSING ABUTTING HARBOR AREA. It is not a valid objection to the necessity of a railroad company's condemnation of tide lands, that it must first cross the abutting harbor area and that the constitution and laws prohibit the acquisition of harbor area by condemnation, since the state may lease for thirty years the right to construct a railroad on the harbor area (RUDKIN, C. J., MOUNT, DUNBAR, and CROW, JJ., dissenting).

EMINENT DOMAIN—DAMAGES—TIDE LANDS—TITLE—RIGHT TO LEASE HARBOR AREA. The owner of tide lands, appropriated by a railroad company, having the preference right to lease the abutting harbor area, is entitled to recover as damages the value of the land taken at the time of the trial and damages to the part not taken, plus the value of the statutory right to lease abutting harbor area; and it is immaterial that the title to the tide land was not acquired from the state until after the condemnation suit was commenced, it having been previously applied for.

¹Reported in 103 Pac. 809.

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Opinion Per Gose, J.

EMINENT DOMAIN—CONDITIONS PRECEDENT—RIGHT TO BRIDGE STREAM—NAVIGATION. The consent of the secretary of war to construct a bridge over a navigable stream is not a condition precedent to condemnation of tide lands to be reached by way of the bridge, inasmuch as the state has given its consent by Bal. Code, §§ 4336, 4307, providing that bridges across navigable streams shall be so constructed as not to interfere with or obstruct navigation.

EMINENT DOMAIN—CONDITION PRECEDENT—SUBSCRIPTION OF CAPITAL STOCK—PLEADING. An allegation of the incorporation of a railroad company seeking to condemn land is not a compliance with Bal. Code, § 4250, providing that no railroad company shall institute such proceedings until the whole amount of the capital stock is subscribed, as that condition is not essential to incorporation.

SAME—WAIVER OF CONDITION—PLEA IN ABATEMENT. The provision of Bal. Code, § 4250, that no railroad company shall institute proceedings to condemn land until the whole of its capital stock is subscribed, is a rule of public policy, and is not waived by the landowner's failure to raise it by plea in abatement.

SAME—WAIVER OF PROOF. Waiver of proof of incorporation and payment of a corporate license fee does not waive proof of the subscription to the capital stock of the petitioner.

Certiorari to review a judgment of the superior court for Chehalis county, Irwin, J., entered November 2, 1908, adjudging a public use in condemnation proceedings for a railroad right of way, after a hearing on the merits before the court. Reversed.

W. H. Abel and Hughes, McMicken, Dovell & Ramsey, for relators.

Bogle & Spooner and J. B. Bridges, for respondent.

Gose, J.—This is a proceeding by certiorari to review a decree of condemnation, entered in the superior court of Chehalis county. The respondent, a railroad corporation, on June 15, 1907, filed a petition in the lower court alleging the essential facts showing its right to condemn for a public use a strip of land fifty feet in width across tide land lot No. 6, tract No. 17, of the Aberdeen tide lands, belonging to the relators, except it did not allege that the whole amount

of its capital stock had been subscribed. The relators answered and joined issue on all the material allegations of the petition, and affirmatively averred, that on February 16, 1907, they filed their application to purchase the lot above described in the office of the commissioner of public lands of this state, that they purchased it from the state on October 8, 1908, and that they have since owned the same; that on September 16, 1907, they filed in the office of the commissioner an application to lease the harbor area in front of, and abutting upon, such lot, which application is still pending; that in virtue of the ownership of such lot, they had the preference right to lease the harbor area; that the lot and the harbor area constitute one property, and that the taking of one will materially damage the other. Upon the hearing the court entered a decree adjudging that the respondent is a public service corporation, duly organized and existing under the laws of this state; that its entire capital stock had been subscribed; that it has power, under its articles of incorporation, to acquire, construct, and operate a line of railroad on such route as its chief engineer and board of directors may select; that it is authorized by law to appropriate lands and other property for a right of way; that the relators are interested in tide land lot 6, in tract 17, of the Aberdeen tide lands, over which the respondent's proposed railway would pass, which route and the right of way sought were specifically described, and that such strip of land was necessary for the uses and purposes of respondent; that the contemplated use thereof was a public one, and that the public interest required the prosecution of the enterprise.

The record discloses that the respondent had surveyed and located a line of railroad from a point near Centralia to a point at Hoquiam, in this state; that such located line had been approved by its chief engineer and adopted by its board of directors; that the line of railway extends from the eastern side of Cosmopolis, westerly through that city, on through South Aberdeen to the southerly bank of the Chehalis river,

to and across the land of the relators; that the Chehalis river at this point is a navigable river, in which the tide ebbs and flows; that the harbor area in front of relators' land has been surveyed and established by the state; that the relators' premises extend from the inner line of the harbor area to and including the upland on the bank of the river; that the relators filed their application to lease the harbor area in front of such lot in the office of the state land commissioner, on February 16, 1907, and that the located line of respondent's road crosses the Chehalis river, the harbor area, and relators' tide land lot fronting and abutting on the harbor area.

The relators urge three grounds for a reversal of the decree: (1) That the respondent cannot acquire the right to cross the harbor area in front of their lot, and that for this reason there is no necessity for the appropriation of a right of way over this lot; (2) that the respondent has not secured the approval of a plan to bridge the Chehalis river from the proper officers of the Federal government, and that such approval is a condition precedent to its right to condemn property for a right of way; (3) that the respondent neither pleaded nor proved that the whole amount of its capital stock had been subscribed. These propositions will receive attention in the order stated.

In support of the first proposition, the relators cite and rely upon the constitution, art 15, §§ 1 and 2; *State ex rel. Denny v. Bridges*, 19 Wash. 44, 52 Pac. 326, 40 L. R. A. 593; Bal. Code, § 4334; Laws 1907, p. 674; *Shamberg v. New Jersey Shore Line R. Co.*, 73 N. J. L. 572, 64 Atl. 114, and *In re Milwaukee Southern R. Co.*, 124 Wis. 490, 102 N. W. 402. In the *Shamberg* case the railway company sought to condemn against a private owner a strip of land one thousand feet in length and varying in width from a few inches to a few feet, and which formed the westerly part of a located route, the remainder of which lay below the high water line of the Hudson river and belonged to the state. The

court held that the narrow strip of land could not be condemned, and at page 116 stated its reasons as follows:

"Thus limited, our decision is that the location by the defendant in error of its right of way upon lands of the state which from considerations of public policy it cannot acquire, either by consent or condemnation, does not invest it with the right to condemn the lands of the plaintiff in error covered by such location."

In the *Milwaukee* case the railway company sought to condemn a right of way through a public park in the city of Milwaukee as a part of a continuous line. The court held that it could "efficiently and beneficially exercise the power of locating and building its road between the termini without invading" the park, and that there was therefore no necessity for taking any part of the park, and that it was already devoted to a public use.

Section 1, art. 15, of the constitution, after authorizing the legislature to provide for a commission whose duty it should be to locate and establish harbor lines in the navigable waters in front of the corporate limits of any city, provided that:

"The state shall never give, sell, or lease to any private person, corporation or association any rights whatever in the waters beyond such harbor lines, nor shall any of the area lying between any harbor line and the line of ordinary high tide, and within not less than fifty feet nor more than six hundred feet of such harbor line (as the commission shall determine) be sold or granted by the state, nor its rights to control the same relinquished, but such area shall be forever reserved for landings, wharves, streets and other conveniences of navigation and commerce."

Section 2 of the same article directs that the legislature shall provide for leasing the right to build "wharves, docks, and other structures" upon the harbor areas mentioned in § 1, but that no lease shall be made for any term longer than thirty years. Laws 1907, p. 674, empowers every railway

corporation to appropriate land by condemnation, but exempts harbor areas therefrom.

The respondent concedes that a railway company cannot acquire the harbor area by condemnation, and it also admits that the necessity for the use of relators' property depends upon the right of the respondent to cross the harbor area in front of it, and contends that this right can be acquired from the state by means of a lease. It therefore becomes important to ascertain the true meaning of the constitutional provisions which we have quoted, and the legislation enacted in recognition of the limitations which they impose. The relators urge in their brief, and it was pressed with great zeal and ability by their counsel in the oral argument, that the words in the first section "and other conveniences of navigation and commerce" mean commerce by sea, and that the words "wharves, docks, and other structures" in the second section have reference to other structures such as wharves and docks.

In *Chicago & N. W. R. Co. v. Fuller*, 84 U. S. 560, 21 L. Ed. 710, the court, in defining the word "commerce," said: "Commerce is traffic, but it is much more. It includes also transportation by land and water and all the means and appliances necessarily employed in carrying it on." Our attention has been directed to the statement of this court in *State ex rel. Denny v. Bridges*, where we said: "The word 'navigation,' as used in the first section of the article of the constitution quoted [art. 15, § 1], is clearly used as a qualification of the word 'commerce.'" This statement, however, was not necessary for the determination of the case. The real point at issue in that case was whether the state had power to lease the harbor area to accommodate a private interest only remotely connected with commerce. The statement was, therefore, dictum, and we do not regard it as a sound interpretation of that clause of the constitution.

Commerce by land and commerce by water are so intimately correlated that it was evidently not the intention of

the framers of the constitution to use the words "navigation and commerce" in a restrictive sense. We should rather impute to them the intention to use the words in that broader sense which includes commerce in all its ramifications, to the end that the development of the state's resources should not be hampered. The sparsely settled and undeveloped condition of the state when these words were penned would seem to emphasize the view that the state did not intend to impose a limitation upon itself which would embarrass its progress and development. Rather should we assume that the words were used in recognition of the pressing need at that time for larger transportation facilities, both by land and water. Much of the maritime commerce has neither its beginning nor ending at the sea.

Nor can this view result in a disadvantage to water commerce. The legislature has provided that bridges across navigable streams shall be so constructed as not to "interfere with, impede, or obstruct the navigation of such streams." Pierce's Code, §§ 7091 and 7814 (Bal. Code, §§ 4336, 4307). The law of 1907, page 674, exempting harbor areas from condemnation, is but a recognition of the limitation, imposed upon the state by the article under consideration, to leasing it for a period not exceeding thirty years. It would seem that, with the many distinguished lawyers in our constitutional convention, if it had been the intention to reserve the harbor area for the building of wharves, docks, and other structures in aid of commerce by water only, the intention to do so would have been expressed in unequivocal words.

The construction contended for might result in much mischief. It may well be that the denial of the right to railroad companies to cross the harbor areas of navigable streams would forbid the building of lateral lines, without which the resources of a considerable portion of our state would remain undeveloped. Without such a construction, the interests of the state are abundantly protected by the words of limita-

tion, "and other conveniences of navigation and commerce." We regard the words "other structures" in the second section, as equivalent in meaning to the words "other conveniences" in the first section. They have reference to the same subject-matter, viz., that the area shall be reserved to the state to be used by it or its creatures in aid of navigation and commerce. Pierce's Code, § 8224 (Laws 1899, p. 235), provides, "that the board of state land commissioners shall have the power to lease the right to build and maintain wharves, docks, and other structures upon the harbor areas," laid out in pursuance of the provisions of the constitution. There is no exception made in this section against leasing to railroad companies. Section 8224a (Bal. Code, § 2184), gives the upland owner a preference right to lease the harbor area upon which his upland abuts.

We conclude, therefore, that neither the constitution nor the statute precludes the respondent from acquiring the right to cross the harbor area, provided that in doing so it does not interfere with, impede, or obstruct the navigation of such stream. This right must be acquired from the state. The view we have expressed differentiates the case from the *Shamberg* and *Milwaukee* cases.

The relators are entitled to recover the value of their property at the time of trial for the assessment of their damages. The fact that the lot was acquired, and that the application to lease the harbor area was made, after the commencement of the condemnation suit does not militate against this right. Their recovery will be the value of the part of the tide lot taken and damages to the portions not taken, to which will be added the value of their statutory right to lease the harbor area upon which it abuts. *Grays Harbor and Puget Sound R. Co. v. Kauppinen*, 53 Wash. 238, 101 Pac. 835.

(2) Is the procuring of the consent of the secretary of war to construct a bridge over the Chehalis river a condition precedent to the right of the respondent to condemn property for its right of way? We think not. The state

has given its consent. Pierce's Code, §§ 7091 and 7814. In *State ex rel. Harlan v. Centralia-Chehalis Elec. R. & P. Co.* 42 Wash. 632, 85 Pac. 344, 7 L. R. A. (N. S.) 198, at page 638, we said:

"We think that, when it is made to appear that a promoter of an enterprise of this kind is proceeding diligently with it, and nothing is shown to have occurred that will prevent its ultimate accomplishment, that the court ought not to deny the right to acquire by condemnation an essential part merely because there is a possibility that the enterprise cannot be carried to completion. There is no danger that the property condemned will be applied to uses foreign to the purposes for which it is condemned. The property does not become the private property of the condemning corporation in the sense that it can appropriate it to uses of a private nature. It must use it for the purposes for which it condemns it, or else submit to its reversion at the suit of the state."

This has become the settled rule in this state, and forecloses the relators' contention.

(3) The respondent neither pleaded nor proved that the whole or any of its capital stock had been subscribed. Pierce's Code, § 7053 (Bal. Code, § 4250), provides that no railroad corporation "shall . . . institute proceedings to condemn land for corporate purposes until the whole amount of its capital stock has been subscribed." The respondent first contends that this is included in the general allegation of incorporation. The subscription of the whole of the capital stock is not made one of the elements of incorporation, but a prerequisite to the right to condemn. Secondly, it contends that it is only matter in abatement of the action, and is waived if not specially pleaded; citing *South Yuba Water & Min. Co. v. Rosa*, 80 Cal. 333, 22 Pac. 222, and *Ward v. Minnesota & N. W. R. Co.*, 119 Ill. 289, 10 N. E. 365. In the former case, the party seeking to condemn had failed to comply with the provisions of the code pertaining to the filing of its articles of incorporation in the office of the county clerk. The court held that it was waived unless raised by a plea in

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abatement. In the latter case, it is held that the fact of corporate existence was waived if the landowner went to trial on the merits without requiring the proof to be made. The power of eminent domain is an attribute of sovereignty, and can only be exercised under the conditions fixed by the sovereign power, and in this state the subscription of the whole of the capital stock has been made a condition precedent to the exercise of the power. The statute announces a rule of public policy, not so much for the benefit of the landowner, but as a safeguard against the improvident exercise of the power. The cases cited are therefore not in point. It is urged further that proof of compliance with the statute was waived at the trial by the following agreement between counsel:

"Mr. Bridges: Do you insist on proof of incorporation, etc? Mr. Abel: No, we do not insist on that. Mr. Bridges: Or the payment of the license fee? Mr. Abel: No, I won't raise any point on that."

It is clear that the matter of subscription of the capital stock is not included within the waiver.

The judgment will be reversed, and the cause remanded with directions to permit an amendment of the petition and submission of the evidence in conformity with this opinion. The relators will recover their costs.

CHADWICK, FULLERTON, PARKER, and MORRIS, JJ., concur.

MOUNT, J. (dissenting)—I cannot agree that respondent may acquire, by lease or otherwise, the right to bridge or cross the harbor area in question. The constitutional provision is so plain to my mind that it requires no argument to show that the navigable waters of harbors within the corporate limits of any city shall never be obstructed in any way. Section 1 of art. 15 of the constitution provides:

"The legislature shall provide for . . . a commission whose duty it shall be to locate and establish harbor lines in the navigable waters of all harbors . . . wherever such

navigable waters lie within or in front of the corporate limits of any city . . . The state shall never give, sell, or lease to any private person, corporation, or association any rights whatever in the waters beyond such harbor lines."

This last clause absolutely prohibits the acquisition of any rights in such navigable waters by private persons or corporations. The section then continues:

"Nor shall any of the area lying between any harbor line and the line of ordinary high tide and within not less than fifty feet nor more than six hundred feet of such harbor line (as the commission shall determine) be sold or granted by the state, nor its rights to control the same relinquished, but such area shall be forever reserved for landings, wharves, streets and other conveniences of navigation and commerce."

When it is understood that the harbor area is a strip of water lying between ordinary high tide and the harbor line, which is located in deep or navigable water, and when it is also understood that the state shall never give, sell, or lease any rights in such navigable water to private interests, it seems clear that the reservation of the "landings, wharves, streets, and other conveniences of navigation and commerce" refers to conveniences of navigation and commerce carried on by water, and not to commerce in its broad and general sense. The navigable waters in these harbors were intended to be kept free and open and unobstructed for navigation. The harbor area adjoining the navigable waters was intended to be reserved and controlled by the state for the convenient use of these waters, and is not subject to sale or grant, but the right may be leased for limited times, for the purpose of building and maintaining wharves, docks, and other structures thereon, and for such purposes only. Section 2 of art. 15, Constitution; *State ex rel. Trimble v. Bridges*, 22 Wash. 98, 60 Pac. 66. Obviously the state could not lease this harbor area for manufacturing purposes or for markets, or canning fish, nor for storing ice, for handling fish, or other like purposes; because such purposes are not

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conveniences of navigation or commerce. *State ex rel. Denny v. Bridges*, 19 Wash. 44, 52 Pac. 326, 40 L. R. A. 593.

In this last case cited this court construed these provisions of the constitution and said, at page 47:

"The word 'navigation,' as used in the first section of the article of the constitution quoted, is clearly used as a qualification of the word 'commerce,' and the provisions for maintaining upon the harbor area wharves, docks and other structures, by or through the state, refers to structures which are conveniences of navigation and commerce. We think the language as well as the sense of these two sections of the constitution is plain, and the ordinary rules of statutory and constitutional construction fit this sense. It is plainly said in § 2 that the wharves, docks and other structures are those mentioned in § 1. Then the rule of *ejusdem generis* is plainly applicable here, and 'other structures' must fall within the genus 'conveniences of navigation and commerce.'"

This is conclusive of the question presented in this case. It is said, however, in the majority opinion that this is mere dictum. It may not have been necessary to the decision in that case, but the question was presented, considered, and decided, and, in my opinion, correctly decided, and should therefore now control this case. If no private rights may be granted by the state in the navigable waters of harbors within the limits of a city, then certainly the respondent may not acquire a right to build a bridge across such waters or the harbor area in front thereof. It is sought in this case to cross both the harbor area and the navigable water in front thereof. It is conceded that the respondent has no right to condemn a right of way across this harbor area. Such right is expressly negatived by statute. Laws of 1897, page 674. But it is claimed that a railway bridge is a convenience of commerce. A comprehensive meaning of the word "commerce" may include such structures as railroad bridges, but such structure as is proposed in this case is not a convenience of navigation, or of commerce by navigation, at the place where it is proposed to construct the bridge. It would

clearly be an obstruction thereto and not a convenience. The action should therefore be dismissed.

RUDKIN, C. J., DUNBAR, and CROW, JJ., concur with MOUNT, J.

[No. 7749. Decided August 26, 1909.]

J. P. O. LOWNSDALE *et al.*, *Appellants*, v. GRAYS HARBOR BOOM COMPANY, *Respondent*.¹

NAVIGABLE WATERS—NAVIGABILITY—PLEADINGS—ISSUES AND PROOF. Where the complaint alleges, and the answer admits, that a slough is navigable, it is not error to exclude evidence to show that it was navigable only for floating logs and not in a "commercial sense," as there was no issue as to the navigability.

EVIDENCE—JUDICIAL NOTICE—RECORD IN ANOTHER CAUSE. The court cannot take judicial notice of the record in another cause, even between the same parties in the same court, when not pleaded or proved.

APPEAL—REVIEW—EVIDENCE—JUDICIAL NOTICE. The appellate court will judicially notice only the matters that the trial court is obliged to notice.

EJECTMENT—DAMAGES—INCIDENTAL TORTS—PLEADING. In an action by an upland owner against a boom company to recover possession of the land and the rents, issues, and profits during the detention, the plaintiffs are not entitled to damages for cutting off their ingress and egress from the water, or incidental tortious acts, especially where the acts causing such damage are not pleaded.

NAVIGABLE WATERS—LAND UNDER WATER—TITLE—LOGS—BOOM COMPANIES—RIGHTS CONVEYED. As the state reserved the title in fee to the beds and shores of navigable waters, up to the line of mean high tide, a conveyance of the same by the state to a boom company for booming purposes, grants the exclusive use thereof, except a free passageway between the boom and one of its shores for water craft "for the ordinary purposes of navigation."

SAME—RIGHTS OF UPLAND OWNER. In ejectment for upland bordering on a navigable stream, the plaintiff cannot recover damages for the use of land below mean high tide.

¹Reported in 103 Pac. 833.

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SAME—BANKS AS RETAINING WALL FOR BOOM. Where the banks of a navigable stream are perpendicular and mark the line of ordinary high tide, the upland owner cannot recover from a boom company owning the tide lands for the use of the bank as one of the retaining walls of its boom.

NAVIGABLE WATERS—TIDE LANDS—RIPARIAN RIGHTS. An upland owner on navigable waters has no riparian rights where, in order to reach his lands from navigable waters, he must cross over the tide or shore lands of another which the state has sold.

EJECTMENT—DAMAGES—INJURY TO LAND. Where injury was done by converting plaintiffs' land into a channel of a river, it is immaterial, as far as concerns the damages recoverable in ejectment, whether the channel was navigable or not.

EJECTMENT—DAMAGES—USE OF LANDS. In ejectment against a boom company for uplands and shore lands along navigable waters, the value of the lands as a boom site cannot be considered in determining the damages for detention.

Appeal from a judgment of the superior court for Chehalis county, Morris, J., entered May 21, 1908, upon the verdict of a jury rendered in favor of the defendant, in an action of ejectment. Affirmed.

J. C. Cross (*A. Emerson Cross*, of counsel), for appellants.

J. B. Bridges and *Ben Sheeks*, for respondent.

FULLERTON, J.—This is an action brought by the appellants to recover from the respondent possession of certain real property, and the rental value of the same while they were deprived of its use by the acts of the respondent. In their complaint the appellants allege that they are the owners, by purchase from the state of Washington, of the southeast quarter of section sixteen, in township eighteen, north, of range eleven, west, of the Willamette Meridian, together with the banks of the Humptulips river within the boundaries of such lands, and the shore lands, shore lines and shore rights thereunto belonging, also all of the riparian rights and privileges along and upon the Humptulips river, and the sloughs thereof, within the boundaries of the above described lands; that the Humptulips river is a meandered

stream in which the tide ebbs and flows, and is for many miles navigable; that it passes through the appellants' land, entering at the northeast corner thereof and flowing south into Grays Harbor at a point near the center of the south line of such land; that there is a large, unmeandered, navigable slough connected with the river, and so situated that the river and slough together are valuable for the purposes of booming, rafting, holding, storing and sorting logs which may be floated down the Humptulips river; that there are millions of feet of merchantable standing timber tributary to the Humptulips river which must be brought to market by floating the same down such river, which is the natural and only outlet to market for such timber; that the appellants' land is so situated naturally as to make the river and slough in front thereof especially valuable for storing, rafting, sorting and booming logs, and the use of these lands, together with the shore lands and shore rights for that purpose, are valuable; that the appellants have certain improvements along the banks of the river and slough, consisting of houses, piles and other structures upon and within the lands and the shore lines and shore rights connected therewith; that on and prior to November 15, 1902, the respondent, without right or authority, unlawfully and wrongfully took possession of portions of the premises described, adjoining and abutting upon the river and slough, together with the banks, shore lands, shore lines and shore rights contiguous to and belonging to the lands of the appellants, and appropriated the same to their exclusive use and benefit; that they have also established a boom in the river for the purpose of catching, storing, assorting, and rafting logs, and do now and have used the river above and below the line of mean high tide, within appellants' premises, for the purpose of booming logs, to the exclusion of the appellants therefrom, and constantly keep vast quantities of logs therein to the exclusion of the appellants; that the use of such premises during the time the appellants have

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been excluded therefrom is reasonably worth the sum of \$15,727.50. They prayed a restitution of the premises, and a judgment for their rental value in the sum above named.

The respondent answered, admitting the appellants' ownership of the quarter section of land described in the complaint, and that the river and slough were tidal streams and were navigable in fact, save and except that portion lying above mean high tide, but denied all the other allegations of the complaint. For a further and separate answer, it set up its incorporation under the laws of the state of Washington relating to boom companies, and alleged that, pursuant to its charter, more than ten years prior to the commencement of the appellants' action, it entered into the mouth of the Humptulips river and constructed and maintained therein certain boom works, doing the same in the manner and way provided by law, and that since that time it has continued to maintain, and does now maintain, such boom works therein as are permitted by law. That more than four years prior to the beginning of this action it purchased from the state of Washington all of the tide lands along the river where it runs through the land of the appellant, and is now the owner and holder thereof. For a second affirmative defense it set up the statute of limitations.

A reply was filed admitting the construction of the boom works in the river, but denying that the same were legally constructed or that the same were operated in accordance with the statute, and again alleged that the same was constructed in part upon the premises of the appellants.

There was a trial before a jury, in which evidence was introduced which tended to show that the appellants were the owners of the uplands only; that the Humptulips river was a meandered stream in which the tide ebbs and flows; that all of the tide or shore lands on each side of the stream for its full distance through the appellants' premises had been sold by the state to the respondent, and that they were the owners and in possession thereof; that the slough had its

mouth in the river near the appellants' south line, and extended from thence northwesterly to a point near the west line of appellants' premises, and from thence north to the appellants' south line, from whence it extended in a north-easterly direction nearly if not quite to the south line of section sixteen; that such slough was navigable for the purposes of floating logs, but useful for that purpose only as it was used in connection with the river, and then as a storage basin for logs. It did not appear that either of the parties had acquired the shore lands bordering on this slough.

There was evidence tending to show that the respondent was incorporated as a boom company under the laws of this state and exercising its privileges as such; that all of the respondent's boom works in the river, which the appellants sought to have removed, were constructed on tide lands below the line of mean high tide; that the logs stored in the river and slough, which the appellants alleged were stored upon their property, were stored in the river and slough below the line of mean high tide; that occasionally in extreme tides certain of the logs stored in the slough would float to the high land and lodge there until they were returned by physical force, but other than this there was no occupancy of the appellants' upland. The jury returned a verdict for the respondent, and from the judgment entered thereon, this appeal is taken.

The appellants assign for reversal the following errors: (1) Errors of the court in its rejection of evidence, and its withdrawal of evidence; (2) error of the court in giving instructions; (3) errors of the court in its refusal to give instructions requested by appellants; and (4) errors of the court in denying appellants' motion for a new trial and in dismissing the action.

Discussing their several assignments, the appellants first argue that the court erred in refusing to permit the appellants to introduce evidence tending to show that the slough mentioned and described in the pleadings, while navigable

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for floating timber, was not navigable in a "commercial sense," and hence not subject to the uses which the respondent was making of it. To this objection it is a sufficient answer to say that the appellants in their complaint alleged the slough to be "a large, unmeandered navigable slough," and that this fact was admitted in the answer. There was, therefore, no issue on the question of its navigability, or the purposes for which it was navigable, and it was not error for that reason to refuse to admit the evidence offered.

To sustain their contention that the slough is not navigable in a commercial sense, and that the court should have so ruled in the absence of proofs, the appellants have set out in their brief at length the findings and judgment in another action between the parties in which it appears to have been adjudged that the appellants had rights in the slough, by reason of their upland holdings, not possessed by the public at large, or by the respondent in this action. But the findings and decree were not before the trial court and are not before us. They were neither set out in the pleadings nor given in evidence, and the court cannot take judicial notice of their existence. That a trial court will not judicially notice the record in another cause, even though it be between the same parties and in the same court, was held by us in *Bartelt v. Seehorn*, 25 Wash. 261, 65 Pac. 185, and *Plumley v. Simpson*, 31 Wash. 147, 71 Pac. 710. Such also is the general rule. *Downing v. Howlett*, 6 Colo. App. 291, 40 Pac. 505; *Daniel v. Bellamy*, 91 N. C. 78; *Enix v. Miller*, 54 Iowa 551, 6 N. W. 722; *Anderson v. Cecil*, 86 Md. 490, 38 Atl. 1074; *Gibson v. Buckner*, 65 Ark. 84, 44 S. W. 1034; *Ralphs v. Hensler*, 97 Cal. 296, 32 Pac. 243; *Bank of Montreal v. Taylor*, 86 Ill. App. 388; *Allison v. Fidelity Mut. Fire Ins. Co.*, 74 Neb. 366, 104 N. W. 753; *Simon v. Durham*, 10 Ore. 52. "The record in each particular case must be complete in itself and exhibit the ground upon which the final decision is based." *In re Ollschlager's Estate*, 50

Ore. 55, 89 Pac. 1049. It is of course needless to add that the appellate court notices judicially only those matters that the court of original jurisdiction is obligated to notice. It follows, therefore, that there was no error in either of the rulings here complained of.

The next objection is that the court erred in refusing to admit evidence tending to show that the respondent had so blocked up the river with logs as to cut off the right of the appellants to ingress and egress from the river to their land. It is a sufficient answer to this objection also to say that it is not an issue in the case. As before stated, the appellants' action is one to recover possession of real property which is alleged to belong to the appellants and of which the respondent is wrongfully in possession, and to recover the rents, issues and profits thereof during the time it has been detained by the respondent. Incidental tortious acts causing damage are not admissible in evidence in such an action, especially where no such tort or damages by reason thereof is made an issue by the pleadings. So, also, as to the ruling refusing to admit evidence tending to show that the logs in the river and slough tended to cause the appellants' land to overflow. This was a tort for which an action would lie, but it cannot be recovered for in an action to recover the possession of real property and damages for the detention thereof.

The appellants next complain that the court, on motion of the respondent, withdrew from the consideration of the jury all of their evidence tending to show that the respondent had made use of the banks of the stream as a retaining wall in the operation of its boom. Our examination of the record, however, convinces us that the ruling complained of was not as broad as the objection indicates. The court did rule that the appellants could not recover for use or occupation of the beds of the river and slough below the line of mean high tide. This ruling must unquestionably be correct. The boundary line of the holdings of an upland owner bordering on tide or shore lands is the line of mean

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high tide, or mean high water; he owns no portion of the bed of the stream below such line. The title to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes, was reserved in the state by § 1 of art. 17 of the constitution. This was a reservation of a title in fee, carrying with it all of the attributes of such a title. When, therefore, the state conveys tide or shore lands to an individual it vests in him title free and clear of all rights save such as may be reserved in the grant, and, of course, title in fee passes to the grantor when the instrument of conveyance contains no reservation. In the case at bar, the state granted by deed in fee to the respondent all of the tide lands along each side of the river through the appellants' premises, and to it, by virtue of its compliance with the laws relating to boom companies, the right to the exclusive use of the beds and shores of the river and slough covered by its plat, until such time as its right ceases by operation of law; excepting, of course, a free passageway between the boom and one of the shores sufficient for the passage of "boats, vessels or steam craft of any kind whatsoever, or for ordinary purposes of navigation." There can be, therefore, no right in the appellants to recover for the use of any part of the premises occupied by the respondent which lie below the line of ordinary high tide.

It appears, however, that for a part of the way along the river the banks were perpendicular, or practically so, and that this bank was used as a retaining wall when the water was above as well as below the line of ordinary high tide. This was claimed by the appellants to be a use of their property for which they were entitled to recover, and that the court denied them that right. But if the ruling of the court complained of denied them the right, we find no error in the ruling. The perpendicular bank marked the line of

the appellants' rights as well as that of the respondent. The boundary line between the two grants is a perpendicular plane, and neither party has the right to complain of the encroachment of the other so long as the plane is not crossed, and there can be no crossing when the bank is one side of the plane.

The contentions made under the second assignment are met in the main by what is said with reference to the objections to the admission and exclusion of evidence. The court charged the jury to the effect that the appellants could recover for any use and occupation of their uplands made by the respondent, and could recover possession of the land so occupied, but denied them the right to recover for any use or occupation below the line of mean high tide. These instructions were, as we say, correct on the theory that the appellants were without right in the property in these streams below the line of mean high tide. Certain specific objections, however, remain to be noticed. In its instruction numbered four the court instructed the jury to the effect that a boom company had the right to construct, in the water of the state selected by it, a boom and sheer boom and such other works as may be necessary to carry out the purposes for which it is incorporated, and that an upland owner as such could not recover from it, in an action to recover the possession of real property and damages for its detention, for any abuse of its power such as failing to leave a way open to those who had a right to navigate the stream. The appellants object to this because, as they contend, it allows an interference with their riparian rights. But an upland owner as such has no riparian rights in a river, lake or bay to reach which he must cross the tide or shore lands of another. To hold to the contrary would be to hold that the state did not have title in fee to its tide and shore lands, and that its deed to an individual did not pass to that individual title in fee to the property conveyed, and that all the vast body of shore and tide lands bordering on the waters of the

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state, which the state has sold and which is now in the exclusive possession of the individual purchasers, is subject to common law riparian rights of the owners of the upland bordering on such waters. Among these rights would be the free and uninterrupted right to pass over the same at any place and at all times from the upland to navigable water in its front, and from the navigable water to the upland. This, it is plain, would be to make public and practically destroy property of untold value that has been, up to this time, supposed to be susceptible of private ownership; in fact such a rule would open to the commons all of the immense bodies of tide and shore lands which the state has conveyed to individuals and which is now held as private property.

There are cases in this court which seemingly support the appellants' contention, notably those in which one or the other of the parties to the present action have brought to this court, but these cases must be regarded as incorrectly stating the principle involved rather than as authority. The rule we now conceive to be the correct rule was announced in the early case of *Eisenbach v. Hatfield*, 2 Wash. 236, 26 Pac. 539, 12 L. R. A. 632, and has been repeatedly affirmed since that time. See, *Brace & Hergert Mill Co. v. State*, 49 Wash. 326, 95 Pac. 278, and *Grays Harbor Boom Co. v. Lownsdale*, ante p. 83, 102 Pac. 1041, where the cases will be found collected. It follows from the fact that an upland owner has no riparian rights in tidal waters that the appellants are without riparian rights in these waters, and the court correctly so ruled.

In its fifth instruction the court stated to the jury concerning a channel in the river, known in the record as channel B, that if the course over which it passed had been originally land as distinguished from water, and by some act of the respondent it had been made a channel of the river and thereby the appellants had been deprived of its use, it would be a use and occupancy on the part of the respondent entitling the appellants to recover, and conversely, if they

found the opposite of this, no recovery could be had therefor. It is said of this instruction that it failed to recognize the rights of the parties as fixed by the judgment of the court in the injunction case before mentioned, and failed to distinguish between streams navigable for floatage purposes only, and one navigable in a commercial sense. But, as we have shown, the court could not know what ruling had been made in the other case, since it was neither pleaded nor proven. As to the second objection, it could make no difference, so far as appellants' rights were concerned in this action, whether the channel was large or small, other than its size might affect the amount of the recovery. If the respondent caused the channel to open and thereby deprived the appellants of the use of so much of their land, it was liable to the same extent whether the channel was called navigable for floatage purposes or navigable in a commercial sense. If such a distinction exists there was, therefore, no necessity of noticing it in this part of the charge.

The sixth instruction is objected to because the court, in determining the amount of the appellants' recovery, told them they should not consider the value of the land considered as a boom site. This was correct on the authority of the case of *Grays Harbor Boom Co. v. Lownsdale, supra*.

The objections to the eighth, ninth, and tenth instructions require no special consideration. From the view of the law taken by the trial judge, and which we have adopted as the correct view, they are unobjectionable; the exception and argument thereon being based on the contrary legal view.

The third and fourth assignments likewise require no special consideration. The instructions requested, in so far as they differ from those given by the court, embody the theory of the law of the case maintained by the appellants, and since we hold that theory incorrect, we must hold the requested instructions inapplicable. The motion for a new trial is based on the record, no new matter being presented therein, and the argument made in support of it is met by

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what we have said concerning the alleged errors in the admission and exclusion of evidence, and the objections to the instructions.

The judgment is affirmed.

CHADWICK and MOUNT, JJ., concur.

GOSE, J. (concurring)—I concur on the authority of *Grays Harbor Boom Co. v. Lounsdale*, ante p. 88, 102 Pac. 1041.

CROW, J., concurs with Gose, J.

DUNBAR, PARKER, and MORRIS, JJ., took no part.

[No. 7974. Department Two. August 26, 1909.]

N. C. BARDSLEY, *Respondent*, v. WASHINGTON MILL
COMPANY, *Appellant*.¹

BILLS AND NOTES—PLACE FOR PAYMENT. Where no place of payment is expressed in a note, it is payable where the maker resides or at his usual place of business.

BILLS AND NOTES—MATURITY—DEFAULT IN INTEREST—ELECTION TO DECLARE DUE—DEMAND—PRESENTMENT. The holder of a note cannot exercise the option expressed therein to declare the whole sum due for default in the payment of an interest installment, without presentment, demand and refusal, where the note specified no place for payment, and the makers had an established place of business known to the holder, and were at all times ready to pay the interest due.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered November 30, 1908, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on a promissory note. Reversed.

Danson & Williams, for appellant.

Belden & Losey, for respondent.

¹Reported in 103 Pac. 822.

PARKER, J.—This is a suit upon a promissory note executed by the defendant December 21, 1904, and due December 21, 1909. The ground upon which the plaintiff contends that he is entitled to recover at this time is the alleged default in the payment of interest installments past due, giving him the right to declare the whole debt due. Upon a trial before the court, findings and judgment were made and rendered favorable to the plaintiff, from which the defendant appeals to this court. Exceptions were duly taken by appellant to certain of the court's findings, as well as the court's refusal to make others proposed by appellant. All of the evidence is brought here for our review of the case, and so far as the facts are concerned which, in our opinion, determine the rights of the parties, they are practically undisputed, and may be summarized as follows:

The plaintiff is a resident of Spokane, and the defendant is a domestic corporation of the state of Washington with its place of business at Spokane, at all times since the making of the note sued upon, which is in words and figures as follows:

“\$5000.00

Spokane, Wash., Dec. 21st, 1904.

“On or before Dec. 21, 1909, after date, without grace, we promise to pay to the order of Maida T. Carson Five Thousand Dollars in Gold Coin of the United States of America of the present standard value, with interest thereon, in like Gold Coin, at the rate of 10 per cent per annum from date until paid, for value received. Interest to be paid monthly and if not so paid the whole sum of both principal and interest to become immediately due and collectible, at the option of the holder of this Note. And in case suit or action is instituted to collect this Note, or any portion thereof, we promise and agree to pay in addition to the costs and disbursements provided by statute a reasonable sum of Dollars in like Gold Coin for Attorney's fees in said suit or action.

“Due Dec. 21, 1909, at Spokane, Wash.

“Washington Mill Co.

“Per W. H. Acuff, Pres.

“Per J. C. Barline, Treas.”

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Sometime after the making of the note, it was purchased by E. H. Belden, a resident of Spokane, from the original payee, and by him put up as collateral with the Exchange National Bank of Coeur d'Alene, Idaho. Prior to this time, the installments of interest had been paid from time to time at the office of the appellant, but thereafter, upon notice from the bank, appellant made some payments of interest upon the note by remittance through the mail to the bank, the last of which remittances paid the interest up to December 15, 1907. No further payments being made; the note was transferred to the respondent for the purpose of instituting this suit, which soon thereafter was commenced on February 20, 1908. It is conceded, however, that E. H. Belden was, and still is, the real owner of the note. The evidence is not very satisfactory as to notice of or demand for payment of the interest installments falling due after December 15, 1907, and prior to the commencement of this action. But in any event, such notice or demand, at best, consisted of nothing more than the sending to appellant of a notice or demand for payment of such interest through the mail by the bank while the note was in its possession at Coeur d'Alene. The appellant has at all times been ready and willing to pay the interest accruing since December 15, 1907, as it became due at its place of business in Spokane. But the note has not been presented there at any time, nor was appellant given any opportunity to pay the interest there prior to the bringing of this suit, though the respondent, and also Belden, the real owner of the note, at all times knew the location of the place of business of appellant at Spokane. In so far as these facts were not found by the trial court, they were requested to be found by appellant, and are established beyond controversy by the evidence. It is unnecessary for us to point out the particulars in which we regard the court's findings and conclusions as erroneous.

This is not a question of charging the company primarily liable upon this note as to its ultimate liability. The appel-

lant would not be released from liability to pay the principal and interest thereon by any failure to present the note or demand payment at any particular time or place. This would be true whatever construction might be placed upon its terms as to place of payment, but for determining the right of the respondent to exercise his option to declare the whole of both principal and interest due and collectible upon default in payment of interest installments, we regard the place of payment and the presence of the note there, thus furnishing an opportunity to pay, as of vital moment. Some contention is made upon the question of whether or not the note is by its terms payable at a particular place—that is, whether or not the place named in the note, to wit, “Spokane, Wash.” is a particular place. Considering the fact that Spokane is a large commercial city, it may be that such designation of place of payment is not very specific, and such provision standing alone may not under all circumstances be regarded as designating a particular place of payment other than limiting it to some place within the city. There is, however, a principal of law sufficient for this purpose which we regard as fixing the place of payment of this note and interest thereon with equal certainty as if specifically named by its express terms.

In 1 Daniel, Negotiable Instruments (5th ed.), § 90, the rule is laid down that, “Where no place of payment is expressed in a note the place of payment is understood to be where the maker resides.” And the supreme court of the United States in the case of *Cox v. National Bank*, 100 U. S. 704, 712, 25 L. Ed. 739, uses this language:

“Where no place of payment is expressed in a bill or note, the general rule, in the absence of any agreement or circumstance fixing or indicating a different intention, is that the place of presentment is the place where the acceptor or maker resides, or at their usual place of business.”

See, also, *Baily v. Birkhofer*, 123 Iowa 59, 98 N. W. 594; *Oxnard v. Varnum*, 111 Pa. St. 193, 2 Atl. 224, 56 Am.

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Rep. 255; *Strawberry Point Bank v. Lee*, 117 Mich. 122, 75 N. W. 444; Hunt, Tender, § 313.

At all times since the making of this note, the appellant had an established place of business in Spokane. The original payee and each successive owner of the note, being all residents of Spokane, knew of appellant's place of business there. The note was at no time, after the last payment of interest, presented there, and the only knowledge of the whereabouts of the note on the part of the appellant, after the last payment and before the commencement of this action, was that the same was in possession of a bank in another state. In view of the law, which we regard under the circumstances of this case as fixing the place of payment specific and certain as if named in the note at the place of business of appellant, we think it was not required to go elsewhere to pay interest thereon in order to prevent the owner from exercising his option to declare the whole debt due on account of interest remaining unpaid. Before the owner has the right to exercise such option he must furnish the maker of the note an opportunity to pay at the place where the same is payable, whether that place is determinable by express words in the note or by implication of law. Our negotiable instruments statute, Laws of 1899, p. 353, § 70, provides:

"Presentment for payment is not necessary in order to charge the person primarily liable on the instrument; but if the instrument is, by its terms, payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part."

As above indicated, this note may not be "by its terms payable at a special place," and for that reason we do not base our decision upon this statute, but upon the law which, applied to these undisputed facts, does fix a special place for its payment independent of statute. The appellant being ready and willing to pay at the time and place for payment,

we are of the opinion there was no such default in payment of interest as to entitle respondent to maintain an action upon the whole debt, and that this action was prematurely commenced.

We conclude that the judgment of the superior court should be reversed, with instructions to dismiss the action. It is so ordered.

RUDKIN, C. J., MOUNT, CROW, and DUNBAR, JJ., concur.

[No. 8058. Department Two. August 26, 1909.]

FRANK N. IRELAND *et al.*, Respondents, v. KARL
SCHARPENBERG *et al.*, Appellants.¹

BILLS AND NOTES—FRAUD—BONA FIDE PURCHASER—BURDEN OF PROOF—EVIDENCE—SUFFICIENCY. In an action upon a note procured by fraud, the burden being upon the plaintiff to show that he is the holder in due course, it is error for the court to decide, as a matter of law, that the plaintiff had no notice of the fraud, where there was no evidence as to the manner, consideration, or time of the purchase of the note, save that of one of the plaintiffs, and one installment of interest was past due at the time; since the credibility of the witness would be for the jury, although he was not contradicted by any direct evidence.

BILLS AND NOTES—NOTICE OF DISHONOR—DEFAULT IN INTEREST. Default in the payment of interest is not notice to a holder in due course of dishonor, but it is competent upon the question of good faith.

BILLS AND NOTES—FRAUD—BONA FIDE PURCHASER—EVIDENCE—ADMISSIBILITY. In an action upon a note, upon an issue as to whether the plaintiffs were holders in due course, it being claimed that they were mere figureheads and without interest in the suit, it is error to exclude evidence that \$200 had been deposited with the clerk as security for costs and that the plaintiffs knew nothing about the deposit.

SALES—FRAUD—EVIDENCE—ADMISSIBILITY. Upon the defense of fraudulent representations in the sale of a horse, made by the agent of the vendors, printed advertising cards given to the vendees at the

¹Reported in 103 Pac. 801.

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time, showing the agent's name and describing the vendor's business and the value of its horses, are admissible as part of the representations.

BILLS AND NOTES—EVIDENCE—CONSIDERATION. Upon the defense of fraud in an action upon a note, which had been detached from the written contract in consideration of which the note was given, the defendants are entitled to introduce the contract in evidence as part of the original transaction and to show the consideration for the note.

Appeal from a judgment of the superior court for Spokane county, Hinkle, J., entered December 1, 1908, upon the verdict of a jury rendered in favor of the plaintiffs, in an action on a promissory note. Reversed.

John M. Gleeson (*Joseph F. Morton*, of counsel), for appellants.

Cordiner & Cordiner and *J. C. Kleber* (*John W. Mathews*, of counsel), for respondents.

PARKER, J.—The plaintiffs are residents of the state of Illinois, engaged in the brokerage and banking business, while the defendants are farmers residing in Spokane county, this state. On the 7th day of May, 1906, the defendants signed a paper writing in words and figures as follows:

STOCKHOLDERS' PURCHASING CONTRACT

No. 910

Spokane, Wash., May 7th, 1906.

After a good and satisfactory examination of the Belgian Stallion named Jules D'Or 1635 No. (25894) owned by The Burgess Importing Co., of Wenona, Illinois, and recognizing his value as a means of improving our horse stock, we, the undersigned subscribers, hereby purchase said Stallion of The Burgess Importing Co. accordingly, and we hereby authorize the delivery of said horse to any one of the subscribers hereto.

Capital Stock, \$3200.00.

Shares \$400.00 Each.

.....[Perforated Line].....

No. 910 \$3200.00.

Spokane, Wash., May 7th, 1906.

For Value Received, we or either of us promise to pay to the order of Rob't. Burgess and Son the sum of Thirty Two Hundred Dollars in payments as follows:

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One Thousand and Sixty Six Dollars,	Sept. 1st, 1907.
One Thousand and Sixty Seven Dollars,	Sept. 1st, 1908.
One Thousand and Sixty Seven Dollars,	Sept. 1st, 1909.

with interest at the rate of 8 per cent. payable annually.

J. W. Hatch

Samuel Greene

J. Humphries

John W. Haynes

Henry Binger

Charles Terry

(Guernsey Dairy Co.)

(Per Karl Scharpenberg).

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11702.

On the back of the part which is above the perforated line was indorsed the following:

SUBSCRIBER'S RECEIPT

This is to Certify that I, a subscriber, on the note for the purchase price of the Belgian Stallion No. 1635 (25894) named Jules D'Or, do hereby for myself and associates, acknowledge the delivery of said horse to us by The Burgess Importing Co., in good health and condition, and according to contract, and as represented to us by the salesman of said firm.

Dated this 15th day of May, 1906.

S. Greene.

On the date of the making of the note there was credited \$400 on the back thereof. Thereafter the note was detached from the upper portion and assigned by the payees to the plaintiffs. In April, 1908, plaintiffs commenced this action to recover the balance of the first installment of the principal and interest as appeared to be due by the terms of the note, alleging in their complaint the usual facts as to the making of the note, nonpayment of the first installment and interest, and further alleging that, before the note became due in the state of Illinois, for value, the said Robert Burgess & Son indorsed and delivered said note to said plaintiffs, and said plaintiffs are now the holders in due course and the owners of said note.

This last allegation is denied by the answer, which also contains other denials, though the affirmative allegations of the answer constitute the principal defense, and are in substance as follows: That on the 1st day of May, 1906, E. V. Larson and M. C. Gray came to the homes of the defendants and represented that the Burgess-Gray Horse Importing Company was composed of Robert Burgess and son and M. C.

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Gray of Pullman, Washington, having in their possession a certain horse which they were desirous of selling under certain conditions, and claimed that the Burgess-Gray Importing Company was the owner of said horse and desired to organize an association among the farmers in the locality where these defendants resided, for the purpose of selling said horse; and further informed these defendants that the purchase price of said horse should be divided into shares in the nature of a stock transaction, and that all of said stock should be subscribed by different parties before the sale could be made; that the defendants tentatively became members of the association, but a sufficient amount of stock for the purchase of said horse was not subscribed for by the defendants, and the said Larson and Gray undertook to reduce the price, and credited thereon the sum of \$400 in order that a contract of purchase might be made; that thereafter the Burgess-Gray Importing Company, through their agent, the said Gray, undertook to sell to the plaintiffs said horse as a stock horse for the use of breeding purposes only, for the sum of \$3,200, less the \$400 which was credited on the note given as the purchase price therefor; that the Burgess-Gray Horse Importing Company knew at the time that said horse was diseased and was of no value whatever for said purpose, and that the disease and the maladies from which said horse was suffering and was afflicted were of a latent nature and could not be told by casual observation such as was made by the defendants; that at said times and afterwards said Gray, as agent for said company, represented and stated to the defendants, and each of them, that, if for any reason the said horse proved unsatisfactory or was afflicted with any disease or malady whatsoever, he might be returned to Pullman, Washington, and another horse of like appearance, sound and well, would be furnished the defendants without further cost; that the defendants, believing said fraudulent representations, received said horse and signed the

contract and note above set forth; that, for convenience and at the request of the said Burgess Horse Importing Company and the said Gray, the contract was made payable to Robert Burgess & Son, who were a part of, and represented to be a part of, said Burgess Horse Importing Company; that this was the only contract ever given by the defendants, or either of them, by which they promised to pay to Robert Burgess & Son any sum whatsoever; and if the plaintiffs have any note, as represented in their pleading, it was cut from the said contract without the consent of the defendants, or either of them; that subsequently said horse proved to be unsatisfactory to the defendants, and of no value whatsoever for the purpose for which it was sold; that thereafter said Gray came to the homes of the defendants at their request, and observed the condition of the horse, acknowledged that he was so diseased, and of no account whatsoever, which was true, and stated that they might return the horse to Pullman and receive in exchange therefor a horse of similar appearance, but sound and well; that thereafter, on June 13, 1906, the defendants returned said horse to Gray at Pullman, and demanded of Gray a similar horse of like breed and appearance, having as great commercial value as the former horse would have had had he been sound and well; that said demand was not complied with, nor was any horse offered to be delivered to them, save and except a two-year old colt of a different breed and of a value not to exceed \$600, which said defendants refused to accept, and thereupon demanded a return of their contract and note which had been signed, which was refused; that no other consideration whatsoever was ever given for said contract and note.

The defendants further alleged, on information and belief, that the plaintiffs are endeavoring to assist said Burgess-Gray Horse Importing Company in defrauding these defendants, and are mere figureheads and have no interest in this litigation. The reply of plaintiffs denies the affirmative allegations of the answer. It will be noticed that the names of the

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owner or owners of the horse undergo several changes in the answer, but the reply of the plaintiffs admits that the horse was sold by Robert Burgess & Son to the defendants. It is also evident from the proofs that these various names represent the same owners of the horse. The cause proceeded to trial before the court and a jury upon these issues, at the conclusion of which, upon motion of counsel for plaintiffs, the court, over the objection of defendants' counsel, peremptorily instructed the jury as follows:

"Gentlemen of the Jury, the plaintiffs having proved the making of the note, the purchase of it in good faith in the ordinary course of business, and without any notice whatever of any infirmities or defects in it, and the defendants having for that reason failed to show themselves entitled to introduce the matters that they claim as a defense to the note to the consideration of the jury, the court instructs you that all there is for you to do would be to retire to your room, select a foreman, figure out the amount that is due upon the note, and return a verdict for the plaintiffs for that amount."

Exception was noted by the defendants, verdict and judgment were rendered and entered accordingly, after which motion for new trial was made by defendants and by the court overruled, exception being noted, and thereupon the cause was brought here by this appeal.

All of the evidence taken upon the trial is brought here by statement of facts, upon which we are asked to review the errors assigned. The principal contentions of appellants arise upon the alleged error of the learned trial court in taking the case from the jury, and thereby in effect deciding as a matter of law that the defendants had conclusively proven the purchase of the note in good faith before maturity without notice of infirmities. This presents two questions: *First*: Was the evidence of fraud in the procuring of the note sufficient to entitle defendants to have that question submitted to the jury, had the suit been between the original parties only? *Second*: Was the evidence touching the good faith of the plaintiffs in the purchase of the note and as to

its purchase in due course before maturity such as to entitle defendants to have that question submitted to the jury? If these questions be answered in the affirmative, then the trial court was in error in disposing of the cause as a matter of law.

So far as the first question is concerned, we do not understand from the remarks of the learned trial judge that he expressed any opinion as to whether or not the evidence was sufficient to carry the case to the jury upon the defense of fraud, had the suit been between the original parties. This question, however, we deem necessary to determine before passing upon the rights of the respondents, so far as such rights are dependent upon their being innocent holders; for, if the defense of fraud did not have sufficient evidence in its support for submission to the jury, there would be no infirmity in the note for the respondents to take notice of, and the manner and time of their acquiring the note would be out of the case. To this end we have carefully read all of the evidence produced in support of the allegations of fraud pleaded as a defense in appellants' answer, and are of the opinion that there was abundant evidence, if believed by the jury, to support such allegations, such as would render it clearly erroneous not to submit that question to the jury if the original parties alone were in the cause.

This brings us to the second question: Was the court in error in its peremptory instruction to the jury, and thus deciding as a matter of law favorably to respondents? We are constrained to think error was so committed. It is to be remembered that the allegation of the respondents in their complaint, in substance that they purchased the note before maturity for value in due course, and that they were the owners, is denied by the answer, and thus becomes one of the principal issues of fact in the case, upon which, as we will later see, the respondents had the burden of proof. Without attempting to review in detail the evidence introduced upon this branch of the case, we will call attention to some

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things appearing therein which we regard as of controlling influence. There was no evidence as to the manner, consideration, or time of purchase of the note by the respondents, save that given by themselves. Frank N. Ireland testified as to the amount paid for the note, and that it was purchased of Robert Burgess & Son, August 1, 1907, without any notice of there being any defense thereto. It will be noticed this was after interest was some three months in default, but before maturity of the first installment. Charles Ireland testified to substantially the same effect, but he admitted upon cross-examination that the knowledge he had in this respect was gained from their records, and it was from them he was testifying. No record was produced, so we have no competent evidence of the purchase, or time of purchase, of this note save that of Frank N. Ireland, who, of course, is a witness directly interested in the result of the cause. His testimony in this regard was not contradicted by any direct evidence. There was, however, the circumstance of the interest being in default some three months, as well as other minor circumstances which the jury would have been warranted in taking into consideration in weighing the testimony of Frank N. Ireland, even though not directly contradicted, had the cause been submitted to them. In other words, the jury would not have been required to take the testimony of Frank N. Ireland in this regard as conclusive proof, and there was no other upon that question. Section 59 of our negotiable instrument law, page 351, Laws of 1899, among other things provides:

"When it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as holder in due course."

This is but a statement of the general rule fixing the burden of proof, and which has special force when applied to a case where fraud is involved in the procuring of the note. *Keene v. Behan*, 40 Wash. 505, 82 Pac. 884; *City National*

Bank v. Jordan (Iowa), 117 N. W. 758; *Canajoharie Nat. Bank v. Diefendorf*, 123 N. Y. 191, 25 N. E. 402. See, also, note to same case in 10 L. R. A. 676. On page 200 of the official report of the case last cited, the court says:

"The claim that the plaintiff's cashier was a disinterested witness, whose testimony must be regarded as controlling if not contradicted, cannot be sustained. Aside from the alleged improbability of his statements, he was the financial agent of the plaintiff and the owner of one-fifth of its capital stock, and aside from his direct interest, responsible to his principal for the care, fidelity and prudence with which he discharged his official duties. His interest in the transaction was co-extensive with that of the plaintiff, and brings him directly within the cases which hold that the credibility of such a witness is a question for the jury to determine."

The supreme court of Iowa, expressing similar views in the case of *McNight v. Parsons*, 136 Iowa 390, 113 N. W. 858, uses this language:

"The testimony of the cashier of the bank that he or the bank purchased the note for value before maturity, even though he be not disputed by any other witness to the transaction, is not necessarily sufficient to enable the court to say as a matter of law that he received it in good faith. Such evidence does not negative notice or knowledge on part of other officers of the bank. Moreover, the bank being an interested party, the credibility of the testimony of the cashier was a matter for the jury to pass upon in the light of all the facts and circumstances surrounding the matter under inquiry. In *Joy v. Diefendorf*, 130 N. Y. 6, 28 N. E. 602, 27 Am. St. Rep. 484, the plaintiff sought by his own evidence to prove the circumstances attesting good faith of his possession of the note; and in *Bank v. Diefendorf*, 123 N. Y. 191, 25 N. E. 402, 10 L. R. A. 676, the bank gave like evidence by its cashier, and it was held in each case that even though undisputed the credibility of such evidence and its sufficiency to satisfy the burden of proof resting upon the plaintiff were matters for the jury, and not a question of law to be disposed of by the court. See, also, *Elwood v. Telegraph Co.*, 45 N. Y. 549, 6 Am. Rep. 140. It follows, therefore, that, so far as plaintiff's case rested on the indorsement of the note

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from Bigler & Sons to the bank, the motion to direct a verdict was improperly sustained. . . . Where the taint of fraud once attaches to a written contract, negotiable or otherwise, the law is careful to require every person who seeks to profit by it to show that he comes into court with clean hands. Speaking to this point, the supreme court of Indiana says: 'It would be a departure from principle to hold that the maker must prove that the holder had notice of the fraud. Whether he had notice or not is a matter peculiarly within his own knowledge. It needs no more than a bare statement of the proposition that the plaintiff's possession or nonpossession of notice is a matter peculiarly within his own knowledge to establish it to the satisfaction of a candid mind; and if this proposition be established, then it must follow that proof should come from him, for few rules of law are better settled than that a party whose cause of action or defense rests upon facts peculiarly within his own knowledge must prove those facts.' *Giberson v. Jolley*, 120 Ind. 301, 22 N. E. 306. While it is not to be presumed that a witness will testify falsely, yet it may be presumed that the testimony of a party will more or less be colored by his interests or bias, and, generally speaking, where such testimony is offered to overcome an unfavorable presumption of law or evidence, or to satisfy the burden of proof which the law casts upon him, the question as to his credibility and of the weight and effect of his testimony is for the jury."

We are of the opinion that the appellants were entitled to have the question of good faith of the respondents in the purchase of the note submitted to the jury, together with the question of whether or not it was originally obtained by fraud, and that neither of these questions, in the light of this record, could be determined by the court as a matter of law.

Learned counsel for appellants contend that the default in the payment of interests was of itself notice of dishonor. We do not agree with this contention. *Spencer v. Alki Point Transp. Co.*, 53 Wash. 77, 101 Pac. 509. Such facts appearing by the instrument, might or might not be sufficient for such showing of dishonor. The weight to be given to such facts might be largely influenced by the length of time such interest had remained unpaid after its maturity. While

we hold mere nonpayment of interest after maturity thereof does not of itself show the paper as being dishonored, it nevertheless is a circumstance of some weight to be considered by the jury in determining the good faith of the purchaser, as we have above indicated.

Since our view of this cause will require a new trial, it becomes necessary to briefly notice some of the errors assigned by appellants' counsel upon the court's ruling in the rejection of certain evidence offered by them. Among other things alleged by way of affirmative defense, was that the plaintiffs are endeavoring to assist in defrauding defendants, and are mere figureheads, and have no interest in this litigation, except that they hope to cheat, wrong, and defraud the defendants. Among other things, appellants offered to show, in support of this allegation, which the court refused to allow them to do, that \$200 had been deposited in the office of the clerk of the court under the name of Ireland & Son, as security for costs, they being nonresidents, and that they did not know anything about such deposit or where it came from. This was but a slight circumstance, it is true, but nevertheless we think that appellants had the right to show it, in view of their allegations.

When Larson and Gray visited the defendants and entered upon negotiation for the sale of the horse, they brought with them and distributed among defendants certain cards in the nature of advertising or business cards, on which was printed the words: "Burgess & Gray Horse Importing Co.," in large type, and underneath, the words: "Robert Burgess & Son, Wenona, Illinois," and "M. C. Gray, Pullman, Washington," together with other printed matter setting forth the nature of their business, with statements as to the value and worth of their horses generally. One of these cards was offered by appellants and admitted in evidence, in connection with testimony of their distribution, and afterwards by the court stricken out upon motion of respondents' attorneys, appellants' counsel objecting thereto. This we regard

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as error on the part of the court. It seems to us this card was admissible, together with the other evidence, as part of the representations made by Gray during his negotiations with defendants, considering the evidence touching the relationship of Gray with Robert Burgess & Son.

We have referred to the part of the writing which was detached from the note before assignment. This slip was offered in evidence by appellants and admitted, and afterwards by the court stricken out upon motion of respondents' attorneys, which is claimed by appellants as error. It seems to us that appellants were entitled to have this slip in evidence, since it constitutes a part of the original transaction and shows the consideration for which the note was given.

We conclude that the judgment of the lower court must be reversed, and appellants awarded a new trial. For that purpose the cause is remanded to the trial court with instructions to proceed in accordance with this opinion.

RUDKIN, C. J., DUNBAR, MOUNT, and CROW, JJ., concur.

[No. 8073. Department Two. August 27, 1909.]

*In the Matter of the Disbarment of JAMES HOPKINS.*¹

ATTORNEY AND CLIENT—DISBARMENT—GROUNDS—ACTS INVOLVING MORAL TURPITUDE—FALSE CERTIFICATES OF NOTARY. An attorney is guilty of an act of moral turpitude, within Bal. Code, § 4775, authorizing his disbarment, where, acting as a notary public, he at divers times falsely certified, in his jurat and certificate to affidavits to be used in claims for pensions, that the witnesses appeared before him and were sworn and acknowledged the execution of the papers.

SAME—DECREE OF DISBARMENT—DISCRETION—APPEAL—REVIEW. A decree of permanent disbarment of an attorney will not be disturbed on appeal because of its severity, where from all the evidence it cannot be said that the court abused its discretion.

Appeal from a judgment of the superior court for Spokane county, Huneke and Kennan, JJ., entered December 3,

¹Reported in 103 Pac. 805.

1908, disbaring the defendant from practicing law, after a trial before the court on the merits. Affirmed.

Lucius G. Nash, for appellant.

Frank T. Post, Cyrus Happy, and Robert L. McWilliams, for respondents.

PARKER, J.—This is an appeal by James Hopkins from a judgment of the superior court for Spokane county, permanently disbaring him from practicing as an attorney in the courts of this state. Among other charges made against him, is the following:

“Come now the undersigned, practicing attorneys-at-law of the state of Washington and members of the Spokane bar, duly appointed by the above entitled court to investigate the charges heretofore made against James Hopkins, an attorney of the Spokane, Washington, bar, and charge the said James Hopkins with unprofessional conduct, the commission of misdemeanors involving moral turpitude and the violation of the oath taken by him as such attorney-at-law, and more particularly set forth as follows, to wit: (1) That at divers times during the years of 1903 and 1904, the said James Hopkins, acting as a notary public in and for the state of Washington, did in his jurat and certificate to certain affidavits and declarations to be used, and used in claims for pensions, knowingly certify that the affiants and certifying witnesses named in such affidavits and declarations each personally appeared before him and was sworn thereto and acknowledged the execution thereof, when in truth such affiants and such identifying witnesses, or any of them, did not at the time alleged, nor at any time, appear before him, the said James Hopkins, and that such parties were not then nor at any time sworn by him and did not acknowledge the execution of such affidavits or declarations. That the said James Hopkins was in the Federal court for the eastern district of Washington, tried, convicted and sentenced for the commission of said acts.”

A demurrer was interposed by appellant to this first charge, which was by the court overruled; when he answered and the cause proceeded to trial upon the merits be-

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fore the court, Judges William A. Huneke and Henry L. Kennan presiding, at the conclusion of which the court made findings and conclusions against appellant substantially as charged, and entered judgment thereon as above indicated.

We will first dispose of the contention made upon this first charge which, as we view the case, will determine the legal correctness of the disposition of the cause by the learned trial court, leaving out of consideration for the present the discretion exercised by the court in permanently disbarring appellant rather than suspending him for a definite limited period. It is contended by learned counsel for appellant that the evidence does not warrant the findings of the court upon the first charge. We conclude, however, after a careful review of the admissions in the answer and the evidence given upon the trial, that the facts charged by that part of the complaint above quoted, and so found by the court, are fully sustained. The question presented upon the exception to the court's ruling upon the demurrer and to the exception to the court's conclusions of law, so far as the first charge is concerned, are the same, so we will consider them together, the contention of counsel being that the acts charged, and in substance found by the court against appellant, and upon which he was convicted in the Federal court, do not involve moral turpitude within the meaning of § 4775 of Bal. Code (P. C. § 3197), which provides:

"An attorney and counselor may be removed or suspended by any court of record of the state, for either of the following causes, arising after his admission to practice:—(1) His conviction of a felony or misdemeanor involving moral turpitude, in which case the record of conviction shall be conclusive evidence; . . ."

These acts upon which the conviction of appellant was had in the Federal court constitute a grave offense against the pension laws of the United States, punishable by a fine not exceeding \$500, or by imprisonment for a term of not more than five years. U. S. Rev. Stats. § 4746. The grav-

ity of the offense is thus indicated, though it may be conceded this does not determine the question of its involving moral turpitude. That question, after all, must be determined from the inherent immoral nature of the act, rather than from the degree of punishment which the statute law imposes therefor, though the latter may be some indication of the public conscience relating thereto. Bouvier, in his Law Dictionary, says: "Everything done contrary to justice, honesty, modesty, or good morals is said to be done with turpitude;" while Anderson's Dictionary of the Law defines turpitude as, "Doing a thing against good morals, honesty, or justice; unlawful conduct; infamy." The supreme court of Pennsylvania, in the case of *Beck v. Stitzel*, 21 Pa. St. 522, 524, refers to moral turpitude in this language:

"This element of moral turpitude is necessarily adaptive; for it is itself defined by the state of public morals, and thus far fits the action to be at all times accommodated to the common sense of the community."

See, also, *Ex parte Mason*, 29 Ore. 18, 43 Pac. 651, 54 Am. St. 772; *In re Coffey*, 123 Cal. 522, 56 Pac. 448; *In re Kirby*, 10 S. D. 322, 39 L. R. A. 856; Newell, Slander & Libel, 98.

Now, do the acts found against the appellant, and for which he was convicted in the Federal court, violate the commonly accepted standard of good morals, honesty, and justice? Suppose we measure his conduct in this regard, not by any puritanical standard, but by the standard of right conduct generally prevailing among our people, uninfluenced by the fact that the statute law also punishes such conduct as a crime. What, then, is the answer to the question whether or not such acts involve moral turpitude? It seems to us that there can be but one answer, and that is against the contention of the learned counsel for appellant. Certainly a false statement, made with full knowledge of its falsity, concerning a matter of serious moment, the purpose of which is to influence those in authority in determining

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their official acts, involves a question of morals, whether such statement be made under the sanctity of an oath to speak the truth or under the sanctity of official obligation to speak the truth. This presents a question of right conduct from a purely moral standpoint, independent of the fact that the law prescribes a punishment for the making of such false statements. "Thou shalt not bear false witness," was not only one of the ten commandments of the Mosaic law, but finds sanction in the teachings of Jesus as a standard of right under the new dispensation. Indeed, this standard of right seems to be a part of the moral consciousness of the race, and to be recognized by all peoples with any appreciation of moral ideals.

We have considered the first charge and the court's findings thereon so far without regard to the degree of appellant's guilt, or as to whether or not the learned trial court exceeded its discretion in permanently disbarring him, and only for the purpose of determining the question of moral turpitude involved in the offense for which he was convicted in the Federal court. From these considerations we conclude that the appellant was convicted of a crime involving moral turpitude; and therefore the judgment of the trial court finds ample support under § 4775 above quoted.

It might be that, if the judgment of the learned trial court rested entirely upon the first charge and the findings made thereon, it would seem rather severe in permanently disbarring appellant, in view of some of the mitigating circumstances shown. This, however, presents a question of discretion only, similar to the rendering of a judgment or sentence upon a conviction by a jury, of which the learned judges of the trial court, who saw and heard the witnesses testify, including the defendant, are in much better position to judge than is this court. There were other charges, and a great deal of evidence heard by the court relating thereto. We have read all of this evidence, as well as that pertaining to the first charge, more for the purpose of as-

certaining whether or not the trial court exceeded a sound judicial discretion than for the purpose of determining the legal sufficiency of such evidence to support such other charges standing alone. We deem it unnecessary to review the contentions made upon these additional charges, since we conclude that the facts shown in support of the first charge are sufficient in law to sustain the judgment; and in view of the whole evidence, we cannot say that the judgment of the trial court goes beyond the bounds of reasonable discretion in permanently disbarring the appellant.

We have examined questions upon the rejection of certain evidence offered by counsel for appellant, and find no error therein. They are not such that we feel called upon to review them here. The judgment of the trial court is affirmed.

RUDKIN, C. J., DUNBAR, MOUNT, and CROW, JJ., concur.

[No. 7810. Decided August 27, 1909.]

J. B. CORDINER, *Respondent*, v. FINCH INVESTMENT
COMPANY, *Appellant*.¹

TAXATION—RECOVERY OF LAND SOLD FOR TAXES—QUIETING TITLE—COMPLAINT—SUFFICIENCY. In an action to quiet title, the complaint sets out the cloud upon the title with sufficient certainty, when it alleges that the defendants claim through void tax title proceedings, giving the court, the number, and title of the case, referring to the judgment and tax deed following, and describing particularly the summons and manner of serving, showing the entire proceeding to be void, all of which were matters of record.

SAME—TAX TITLE—QUIETING TITLE—CLOUD—WHAT CONSTITUTES. In this state a tax judgment and deed may be set aside for patent as well as latent invalidity, as a cloud upon the title.

TAXATION—RECOVERY OF LAND—TENDER—PLEADING. In an action to set aside a tax title, an allegation of the tender of all taxes paid, in the language of the statute, is sufficiently definite without stating the amount of the tender.

¹Reported in 103 Pac. 829.

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SAME—FAILURE TO DENY TENDER—WAIVER OF LIEN—APPEAL—REVIEW. Where, in an action to set aside a void tax sale, the defendant failed to deny an allegation that the plaintiff tendered all taxes, penalties, interest, and costs paid at the sale, he cannot on appeal claim insufficiency of the amount of the tender; and by failing to assert a lien for the taxes paid, he waives the same.

EQUITY—LACHES—LIMITATION OF ACTIONS. Laches cannot be claimed in the bringing of an action to set aside a tax judgment, where nothing was shown except the lapse of time, and the statute of limitations had not run against the action.

QUIETING TITLE—DEFENSES—PURCHASE OF DEBATABLE TITLE—ATTORNEYS—RIGHT TO SUE—CHAMPERTY. In an action to remove the cloud of a void tax sale, it is no defense to allege that the plaintiff is an attorney at law and purchased a debatable title for an inadequate consideration for speculative purposes, and to foster litigation.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered July 9, 1908, in favor of the plaintiff, upon motion for judgment on the pleadings, in an action to quiet title. Affirmed.

Wakefield & Witherspoon and W. H. Smiley, for appellant.

Cordiner & Cordiner and J. C. Kleber, for respondent.

FULLERTON, J.—This is an action to quiet title to certain real property, and to have certain tax proceedings, wherein the property was sold and conveyed under a purported judgment of the superior court of Spokane county, declared null and void. In his complaint the plaintiff alleged, that he was the owner in fee simple of the premises so sold, that the same were vacant and unoccupied, and that he was lawfully entitled to their possession; that the defendant was a corporation; that it claimed some title, right or interest in the land adverse to that of the plaintiff through and under an attempted tax foreclosure proceeding had in the superior court of the state of Washington for Spokane county, numbered 15,355, wherein John A. Finch was plaintiff and Alice E. Burdick was defendant, and wherein the title of Alice E. Burdick, who was then the owner in fee simple of the premises, was attempted to be cut off; that Alice E. Burdick was

at the time of the foreclosure proceeding a nonresident of the state of Washington, and was never within the state of Washington during the time of such foreclosure proceeding; that no service of summons or notice in the foreclosure action was ever made on Alice E. Burdick, neither did she appear therein nor give notice of her appearance therein, and the court did not otherwise have jurisdiction over her person. It is then alleged that the claim of jurisdiction is based on a certain notice and affidavits each of which were set out in full. The tenth and eleventh paragraphs and prayer of the complaint were as follows:

"That the court never acquired jurisdiction over the defendant, or over the land and premises described in said attempted tax foreclosure proceedings, the same being the lands and premises described in this complaint, for the reason that the said defendant was never served personally, by publication or otherwise, with summons or notice; that she never in any manner appeared in said action; that the only manner in which the court attempted to acquire jurisdiction was by summons by publication in words and figures and in the manner and form as set out in paragraph 6 herein; that the said summons was not in accordance with the statute in such cases made and provided, and was and is wholly null and void; that its publication did not confer upon the court jurisdiction to render or enter any judgment therein; that the judgment attempted to be rendered and entered in said tax foreclosure proceedings was and is wholly null and void and of no force whatever; that all of said attempted tax foreclosure proceedings, including the tax deed issued thereunder by the treasurer of Spokane county on the 27th day of April, 1901, are null and void; and that the said attempted tax foreclosure proceedings, including the said tax deed attempted to be issued thereunder, confer upon said defendant no right, title or interest in said land or any part thereof.

"(11) That prior to the commencement of this action, plaintiff tendered to said defendant, in United States of America gold coin, all taxes, penalties, interest and costs paid by said purchaser at said void tax sale or his assignees or grantees, and that said tender was refused by said defendant, and that said plaintiff is ready, able and willing

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to pay all taxes, penalties, interest and costs to which said defendant is entitled by law.

"Wherefore, Plaintiff prays judgment as follows: That the judgment attempted to be entered in said tax foreclosure proceedings, being case No. 15,355 in the above entitled court, be declared and decreed to be null and void; that the tax deed issued in pursuance thereof be declared null and void; that all subsequent deeds based thereon be declared null and void; that he be permitted to redeem from said attempted tax sale, that he be adjudged to be the owner in fee simple of the lands and premises in this complaint free from any right, title, claim or interest on the part of the said defendant; and that he have such other and further relief as he may be entitled to under the premises, together with his costs, attorney's fees and disbursements herein."

After service of summons upon it, the defendant appeared in the action and moved the court to require the plaintiff to make his complaint more definite and certain in the following particulars; that he state in what way he deraigned his title from Alice E. Burdick, and if the transfer is in writing that he set forth the same and furnish the defendant with a copy thereof; that he state whether a judgment by default was entered in the cause referred to in paragraph ten of the complaint, and set out a copy of the judgment; that he set out the proceedings in the action referred to in paragraph ten, and that he state when and where the tender was made, mentioned in paragraph eleven, and state to whom the tender was made. As a part of the same motion it requested the court to require the plaintiff to furnish it with the same information in the form of a bill of particulars. The motion was denied, whereupon the defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. On hearing, the demurrer was overruled. The defendant thereupon filed an answer which did not controvert any of the allegations of the complaint, but alleged, on information and belief, that the plaintiff in the action was an attorney at law practicing his profession

in the city of Spokane, and that he was one of the attorneys for the plaintiff in the pending action. That whatever claim he might have to the land described in the complaint was obtained by him not in good faith or for a valuable consideration, but was obtained for the purpose of bringing the action, and for the purpose of fostering litigation, and for speculative purposes.

The plaintiff thereupon moved for judgment in his favor on the pleadings, which motion the court granted, entering judgment declaring void all of the proceedings had in the tax foreclosure proceeding, quieting title in the plaintiff to property described therein, and giving the plaintiff judgment for his costs. It found, however, that the defendant had paid taxes on the land amounting to the sum of \$39.93, and gave it judgment for this sum, declaring the same a lien upon the land. From this judgment the defendant appealed.

On appeal the defendant makes four assignments of error. The first three, however, are argued under one head, namely, that the complaint does not state facts sufficient to constitute a cause of action; and we will so consider them. It is first argued that the complaint fails to show that there are any clouds upon the plaintiff's title. But the complaint we think does set out the instruments constituting the cloud with sufficient certainty. It is alleged that they arise out of a certain tax foreclosure proceeding, the number, title, and the court wherein the proceedings were had, are stated. The judgment alleged to be void is stated to be the judgment entered in that proceeding, and the tax deed alleged to be void is stated to be the tax deed issued by the treasurer of Spokane county under that judgment, bearing a certain date. Under the liberal provisions of our statute, this states with sufficient certainty the instruments alleged to constitute the cloud. True, it is not alleged in words that these instruments constitute a cloud on the plaintiff's title, but that is the necessary inference from the facts pleaded, and this is sufficient

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to satisfy the rule. The summons and the manner of service thereof is set out with particularity. These show the entire tax foreclosure proceeding to be void, under the authority of *Thompson v. Robbins*, 32 Wash. 149, 72 Pac. 1043, and kindred cases following that decision. As we said in *Boyer v. Robinson*, 43 Wash. 97, 86 Pac. 385, "The claim of the respective parties was evidenced by written instruments and records, and there is no pretense that the appellant was surprised or misled by the claim of title disclosed by the respondents, or by any lack of information as to the nature of his own claim."

Furthermore it is not the rule in this state that the court will set aside a deed or other instrument adversely affecting the plaintiff's title to real property only in those cases where extrinsic evidence is necessary to show its invalidity. It is our practice, contrary perhaps to the general rule, to set aside the invalid instrument whether the invalidity be patent or latent. *Lemon v. Waterman*, 2 Wash. Ter. 485, 7 Pac. 899; *Jackson v. Tatebo*, 3 Wash. 456, 28 Pac. 916; *Montgomery v. Cowlitz County*, 14 Wash. 230, 44 Pac. 259. For this reason less particularity in setting out the invalid instrument is required in this jurisdiction than in a jurisdiction where the contrary rule prevails.

The second objection under this head is that the complaint fails to allege the amount of the tender. This allegation was made in the words of the statute and stated the ultimate fact to be proven. This was sufficient. Had the appellant desired to contest the allegation it could have put it in issue, and put the plaintiff upon proofs. But failure to state the amount tendered is not fatal to the complaint. *Kahn v. Thorpe*, 43 Wash. 463, 86 Pac. 855, does not announce a contrary doctrine.

The third objection is that the record shows on its face that the plaintiff's tender was insufficient. This contention is founded on the fact that the court allowed the appellant a judgment for \$39.93, while the summons set out in the

complaint showed that the face value of the certificates foreclosed was \$81.32 without the accumulated interest. But this proves nothing. The plaintiff alleged that he had tendered the defendant all taxes, penalties, interest and costs paid by him at the tax sale, and the defendant admitted the fact by failing to deny it. This ended the matter in so far as the plaintiff was concerned. He was not obligated either by statute or the practice to bring the money into court. Nor was the court obligated to give the defendant judgment for the amount tendered as a condition precedent to setting aside the sale. The superior courts of this state will, in the exercise of their general equity powers, allow a person, who has paid taxes upon the land of another in the belief that the title to the land is in him and that he has a right to pay such taxes, a lien on the land for the amount of taxes paid, where he comes into court and asserts his lien. But it is a right which the claimant may waive, and he does waive it in all cases where he fails to assert it.

The fourth objection is that the plaintiff was guilty of laches. But there is nothing on the face of the complaint that shows laches. The action was commenced within the period of the statute of limitations, and the statute always measures the time within which an action may be begun, in the absence of some special circumstance rendering the prosecution of the action inequitable. When nothing is shown but lapse of time, laches cannot be claimed within the period of the statute. We conclude, therefore, that the complaint states a cause of action.

The last assignment is that the court erred in holding that the appellant's answer did not state facts sufficient to constitute a defense. Stripped of its verbiage the allegation is that the respondent is an attorney at law, and that he purchased the interest of a former owner of the land for an inadequate consideration, expecting to recover it, at the end of a lawsuit, on the strength of the title so acquired. But whatever may be said concerning the morality of the

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transaction, the court cannot say it is illegal. There is no positive rule of law that denies to a purchaser of a debatable title to land, even though he be an attorney at law, the right to litigate in the courts the question of the sufficiency of the title so acquired.

There is no error in the record, and the judgment will stand affirmed.

RUDKIN, C. J., MOUNT, GOSE, CHADWICK, CROW, and DUNBAR, JJ., concur.

[No. 7808. Decided August 30, 1909.]

AMERICA C. BRAMEL, *Respondent*, v. FRED S. RATLIFF, as
Sheriff of Whitman County et al., *Appellants*.¹

HUSBAND AND WIFE—SEPARATE DEBT OF HUSBAND—LIABILITY OF WIFE'S SEPARATE ESTATE. Judgment recovered in another state against the husband alone, on a contract relating to his separate estate, in an action wherein the wife appeared and her demurrer to the complaint was sustained, is the separate debt of the husband, and a judgment thereon in this state, against the husband alone, cannot be enforced against the wife's separate property.

EXECUTION—ISSUANCE—JUDGMENT IN ANOTHER COUNTY—SALE—VALIDITY. Execution cannot be issued by the superior court of one county upon the transcript of a judgment rendered by the superior court of another county, and any sale under such an execution would be void.

Appeal from a judgment of the superior court for Whitman county, Chadwick, J., entered May 6, 1908, in favor of the plaintiff, upon sustaining demurrers to answers, in an action to enjoin an execution sale. Affirmed.

John O. Bender, for appellants.

Thomas Neill, for respondent.

CROW, J.—This action was commenced by America C. Bramel against Fred S. Ratliff, sheriff of Whitman county,

¹Reported in 103 Pac. 817.

to enjoin him from selling plaintiff's separate property, upon which he had levied an execution, issued on a judgment against T. E. Bramel, plaintiff's husband. The judgment creditor, William Vecans, intervened, pleading his judgment, and the sheriff answered making substantially the same allegations as did the intervener. Separate demurrers to the answer and complaint in intervention were sustained, the defendant and intervener declined to plead further, and judgment was entered enjoining the sale and quieting plaintiff's title. The defendant and intervener have appealed.

The sheriff and intervener each failed to deny any material allegation of the complaint, but pleaded affirmative matter only, and the only question before us is whether the answer, or the complaint in intervention, stated facts sufficient to constitute a defense. The pleadings of the two appellants being in substance the same, a consideration of the complaint in intervention will be sufficient. The respondent alleged that T. E. Bramel was her husband; that the appellant, William Vecans, had obtained a judgment against T. E. Bramel in the superior court of Asotin county; that he had caused a transcript thereof to be filed in the office of the clerk of the superior court of Whitman county; that an execution had been issued thereon, out of the latter court, which the sheriff had levied on land in Whitman county, respondent's separate property; that respondent was not a party to the action in which the judgment had been obtained in Asotin county; and that the sheriff was about to sell her separate property and cloud her title.

In his complaint in intervention, the appellant William Vecans in substance alleged, that on February 15, 1906, the respondent America C. Bramel and T. E. Bramel, her husband, had, by written contract, agreed to sell and convey to Henry Vecans and Otto H. Olson certain land in Whitman county, which was the vendors' community property; that on April 21, 1906, Henry Vecans and Otto H. Olson commenced an action in the district court of the second judicial dis-

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trict of the state of Idaho, against America C. Bramel and T. E. Bramel, on the contract of sale, to recover \$6,200; that the defendants therein appeared jointly by motion to strike, and by demurrer to the complaint; that thereafter America C. Bramel appeared separately and interposed her demurrer to the amended complaint, which was sustained; that T. E. Bramel answered; that the cause was tried on the issues thus raised; that judgment was entered against T. E. Bramel alone for \$3,778.50; that America C. Bramel appeared at the trial by the same attorneys who represented her husband; that she defended in like manner as though she had answered; that the land described in the contract of sale was the community property of Bramel and wife; but that at the trial Bramel and wife had alleged it was the separate property of T. E. Bramel; that because of such contention and representation the action was not prosecuted on the theory that it was community property; that on November 24, 1906, the judgment obtained against T. E. Bramel in Idaho was assigned to William Vecans, the intervener and appellant, who commenced an action thereon against T. E. Bramel, in the superior court of Asotin county, Washington, and there obtained the judgment on which the execution involved herein was afterwards issued by the clerk of the superior court of Whitman county.

It affirmatively appears, from the complaint in intervention, that the land described in the contract of sale, which was the subject-matter of the action in Idaho, was not the land involved in this action. The land here involved is alleged by respondent to be her separate property, and that allegation is not denied by either appellant. The Idaho judgment was entered against T. E. Bramel alone, in an action in which the demurrer of America C. Bramel had been sustained, and was obtained upon the theory that the land then under consideration was the separate property of T. E. Bramel. It has not been alleged, nor does it appear, that America C. Bramel had contracted any obligation or incurred any liabil-

ity relative to the land or the contract of sale involved in the Idaho action. It does appear that the Idaho judgment was the sole cause of action upon which the subsequent judgment was obtained in Asotin county, Washington. These facts indicate that the two judgments against T. E. Bramel were rendered for his separate debt. There is an utter absence of allegations to show that either one of the judgments was predicated upon any obligation, community or otherwise, for which the separate property of America C. Bramel could be held. The complaint in intervention failed to state any cause of action against the respondent and in favor of the intervenor, or a defense to the complaint. The answer of the sheriff was also insufficient, and the demurrers were properly sustained.

The respondent was entitled to an injunction in this action for another reason. The judgment upon which the execution was issued was rendered in the superior court of Asotin county, while the execution under which the sheriff was proceeding was issued out of the superior court of Whitman county. Any sale made under such an execution would not convey any interest in the land, but would only cast a cloud upon respondent's title. *Murray v. Briggs*, 29 Wash. 245, 69 Pac. 765; *Humphries v. Sorenson*, 33 Wash. 563, 74 Pac. 690.

The judgment is affirmed.

RUDKIN, C. J., FULLERTON, MOUNT, DUNBAR, and PARKER, JJ., concur.

CHADWICK, J., took no part.

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Opinion Per MOUNT, J.

[No. 7910. Department Two. August 30, 1909.]

N. H. CASTLE, *as Guardian of the Person and Estate of John M. Warring, Senior, Respondent*, v. FRANK O. DOLE *et al., Appellants*.¹

DEEDS—CANCELLATION—FRAUD—INCAPACITY OF GRANTOR. There is sufficient evidence to warrant the cancellation of a deed for incapacity of the grantor, where it appears that he was a weak old man, 88 years of age, incoherent in his talk, with delusions that his son and others were trying to poison him, and a physician testified that he was totally incompetent to transact business, and he had sold the land worth \$3,000 for \$1,250.

Appeal from a judgment of the superior court for Jefferson county, Still, J., entered July 20, 1908, upon findings in favor of the plaintiff, after a trial before the court without a jury, in an action to cancel a contract. Affirmed.

Ben Sheeks, for appellants.

Elmer E. Shields, for respondent.

MOUNT, J.—This action was brought by the respondent to set aside a contract for the sale of real estate, upon the alleged grounds of fraud and mental incapacity of the grantor. In April, 1907, John M. Warring, Sr., entered into an agreement to sell 160 acres of timber land in Jefferson county to the appellant F. O. Dole, for a consideration of \$1,250. On December 4, 1907, a deed was executed by Mr. Warring and placed in escrow to be delivered to Dole upon the payment of the sum named above. On December 30, 1907, Mr. Warring was adjudged incompetent to care for his property, and respondent was duly appointed guardian of his person and estate. Shortly thereafter, this action was brought to set aside the contract and to cancel the deed on the ground of mental incapacity of said Warring, and for fraud alleged to have been practiced upon him by appellant Dole. At the

¹Reported in 103 Pac. 828.

trial of the case to the court without a jury, a decree was entered as prayed for in the complaint. The defendants appeal.

The only question presented in the case is one of fact. It is argued by the appellant that the evidence shows that Mr. Warring fully comprehended the nature and effect of the contract at the time he entered into it, and that fraud or overreaching was not shown. We find very little in the record to show actual fraud. It is shown, however, that the land was worth \$3,000 at the time the contract was made, and that the consideration for the sale was \$1,250, none of which had been paid except about \$23. A careful reading of the evidence convinces us that Mr. Warring, at the times the contract and deed were executed, was mentally incapacitated and did not comprehend the nature of the contract. The evidence very clearly shows that he was a weak old man, 88 years of age. He was very deaf, garrulous, and incoherent in his talk and ideas. He had delusions that his son and others were trying to poison him. He had practically no memory of recent events and was suffering from senile dementia to such an extent that, in the opinion of the physician who witnessed his examination, he was totally incompetent to transact any business, either at that time or prior to the date of the contract. While there were some witnesses who testified that in their opinion Mr. Warring was competent to transact business, we think the decided weight of the evidence was the other way. His incompetency, taken into connection with the fact that he agreed to sell property worth \$3,000 for the sum of \$1,250, was amply sufficient to justify the decision of the court setting aside the contract and deed. 13 Cyc. 574.

The judgment is therefore affirmed.

RUDKIN, C. J., CROW, DUNBAR, and PARKER, JJ., concur.

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Opinion Per CROW, J.

[No. 7665. Decided September 2, 1909.]

JOHN PRENTICE, *Respondent*, v. FRANKLIN COUNTY *et al.*,
Appellants.¹

APPEAL—REVIEW—DISMISSAL—CESSATION OF CONTROVERSY. Where a judgment against a county has, by order of the county commissioners, been paid and satisfied, an appeal on behalf of the county will be dismissed, as the controversy has ceased.

COUNTIES—AUTHORITY OF COMMISSIONERS—CONTROL OF LITIGATION—PROSECUTING ATTORNEYS. Under Bal. Code, § 342, subd. 6, giving the county commissioners power to prosecute and defend all actions, the commissioners have power to direct the dismissal of an appeal from a judgment against the county, taken by the prosecuting attorney.

Appeal from a judgment of the superior court for Franklin county, Zent, J., entered June 15, 1908, denying a motion to vacate a judgment entered on stipulation, after a hearing before the court. Appeal dismissed.

W. D. Schutt, A. C. Routhe, and John L. Sharpstein, for appellants.

Henry J. Snively, for respondent.

CROW, J.—In June, 1902, a general delinquent tax foreclosure judgment was entered in the superior court in and for Franklin county, under which that county acquired tax titles to a large number of town lots and other tracts of land. On October 13, 1906, this action was commenced by John Prentice, as plaintiff, against Franklin county, and C. S. O'Brien, its treasurer, as defendants, to vacate the tax foreclosure and judgment, to set aside the sales made to Franklin county thereunder, and to enjoin the county treasurer from selling a number of the lots and tracts of land to which the plaintiff claimed title. On January 14, 1907, a written stipulation was filed, reading as follows:

"It is hereby stipulated that the judgment and decree of foreclosure in the complaint in this case described, be set

¹Reported in 103 Pac. 831.

aside, and the sales of the property made under said judgment and decree of foreclosure be set aside, and that the plaintiff pay to the Treasurer of Franklin County in full of all taxes interest and penalties upon said property to date, the sum of Two Thousand dollars apportioned equally to the years where taxes have accrued and are assessed against said property and unpaid at this time, said decree shall be entered by the Judge of the Superior Court of Franklin County at North Yakima upon and under this Stipulation, and it is agreed that this matter shall come up before Hon. H. B. Rigg, Judge of the Superior Court of Franklin County, Wash. upon this stipulation for the entry of a decree and judgment upon this stipulation at North Yakima, Washington, at the chambers of said Judge on the 19th day of January, 1907, at the hour of ten o'clock A. M. or as soon thereafter as counsel can be heard.

"This stipulation only applies to the lots which have not been sold by the County, and which have been acquired by the County in virtue of said foreclosure proceedings.

"The lots sold by the county acquired under said proceedings are excluded from this stipulation, and are to be in no wise affected thereby, but are by this stipulation to be withdrawn from said suit, and to be considered as never having been included therein.

"The decree herein provided for, shall be entered within three days after it is signed by the Judge rendering it, and the said money shall be paid within 20 days after the decree has been filed with the Clerk of this Court.

"The County shall make a quitclaim deed also to the plaintiff within the twenty days aforesaid to be delivered to the plaintiff upon his demand, after payment or at the time of the payment of said money.

"Neither party shall recover costs.

"This done by way of settlement of said pending suit, and is done by authority and direction of the board of County Commissioners, and In Witness whereof said Commissioners and all other parties hereto have affixed their names.

"Dated this 14th day of January, 1907.

"Henry J. Snively,

E. T. Juvenal

"Attorney for Plaintiff.

W. T. Johnson

"John Prentice, Plaintiff.

A. W. Kane

County Commissioners, Franklin County.

"W. D. Schutt, Prosecuting Attorney of Franklin County."

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Opinion Per Crow, J.

On January 18, 1907, an attempt was made by the board of county commissioners to revoke the stipulation, and on February 4, 1907, their attorneys served and filed a written motion herein asking that it be withdrawn from the files, vacated, set aside, and cancelled, claiming that it had been obtained by mistake and fraudulently. This motion being resisted by the plaintiff, was, by order of the court, set for hearing, upon oral and documentary evidence, but not upon affidavits. On such hearing subsequently had, the trial court found that no mistake of law or fact had entered into the execution of the stipulation, and denied the motion to vacate. On June 13, 1908, final judgment was entered on the stipulation in accordance with its terms, and from that judgment this appeal is prosecuted.

The respondent, assigning several grounds therefor, has moved to dismiss the appeal, but we will only consider his contentions that the appeal has been taken without any order of the board of commissioners, that they have directed its dismissal, and that the controversy has ceased. In support of these contentions the respondent has filed in this court, under the certificate of the county auditor, a transcript of certain proceedings had by the board of county commissioners on July 8, 1908, at their regular session, from which it appears that the litigation, the stipulation, the judgment of the trial court, and this appeal were then considered, and that the board made findings and orders relative thereto, which in part read as follows:

"We find further that it is not advisable nor expedient nor to the best interests of said county to incur further expense on account of said case in taking and perfecting and prosecuting an appeal from the order entered by the Superior Court of this County, and that no appeal to the Supreme Court should be prosecuted.

"It is therefore ordered by this board that a deed be executed, acknowledged and attested by this board under and in accordance with the provisions of the decree of the Su-

perior Court, entered June 13th, 1908, conveying and quitclaiming the property in question, and the County Auditor is hereby directed to enter and record said deed;

"It is further ordered that any appeal or other proceedings instituted looking to a review of the order above mentioned be dismissed and discontinued, and the prosecuting attorney of this county is hereby directed to dismiss and discontinue of record any and all proceedings now commenced for the purpose of having said case reviewed or said decree set aside by the Supreme Court."

The auditor's certificate further shows, that a deed for the lots and tracts of land has been executed by Franklin county and delivered to the respondent John Prentice, in satisfaction of the judgment and decree of the superior court, and that he has paid to the county treasurer the sum of \$2,000, in full settlement of the delinquent taxes. These facts are not disputed, nor does it appear that the appeal was authorized, or ordered by the board of county commissioners. The controversy having ceased, and the judgment having been satisfied, there is nothing before this court for consideration. The board of county commissioners are entitled to direct a dismissal of the appeal, if they determine such procedure to be for the best interests of Franklin county. Subd. 6 of § 342, Bal. Code, § 342 (P. C. § 4098), confers upon boards of county commissioners the following authority:

"(6) To have the care of the county property and the management of the county funds and business, and in the name of the county to prosecute and defend all actions for and against the county, and such other powers as are or may be conferred by law."

The interests of the defendants in this litigation, prosecuted against Franklin county as the real party in interest, are subject to the orders and control of the board of county commissioners. Although the prosecuting attorney is the legal adviser of the county he is not authorized to prosecute this appeal in opposition to the orders of the board of county

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commissioners. *Spokane County v. Bracht*, 23 Wash. 102, 62 Pac. 446.

The appeal is dismissed.

RUDDIN, C. J., CHADWICK, MOUNT, DUNBAR, and GOSE, JJ., concur.

FULLERTON, J., took no part.

[No. 7955. Department Two. September 9, 1909.]

JOHN BRODERIUS *et al.*, *Appellants*, v. FRED ANDERSON,
Respondent.¹

TRIAL—FINDINGS—NECESSITY—DISMISSAL AND NONSUIT. Upon trial of an action at law before the court, findings of fact are not necessary to support a judgment of nonsuit, granted for failure of plaintiff to prove sufficient facts, under Bal. Code, § 5029, requiring findings by the court on an issue of fact; since the court merely decided the insufficiency of the evidence as a matter of law.

FRAUDS, STATUTE OF—BROKERS—EMPLOYMENT—MEMORANDUM. An agreement with brokers whereby the owner of premises offered to take a fixed sum for his property, the brokers to have all that they could get over that sum, is within the statute of frauds, Laws 1905, p. 110, requiring agreements employing an agent to sell real estate for compensation to be in writing.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered October 5, 1908, upon granting a nonsuit, in an action on contract tried before the court without a jury. Affirmed.

Jones & Salisbury, for appellants.

W. J. Parks and *J. M. Simpson*, for respondent.

PARKER, J.—By their complaint plaintiffs allege, in substance, that prior to December 17, 1907, the defendant agreed to sell to them his farm, consisting of 160 acres of land, with certain personal property, for the total sum of

¹Reported in 103 Pac. 837.

\$6,400, and to execute a good and sufficient deed conveying the same either to the plaintiffs or such other person as they might designate, on payment of said sum, and that thereafter on that day plaintiffs paid to defendant the sum of \$500 as a partial payment thereon; that thereafter, about February 20, 1908, defendant conveyed the premises to Robert Podratz, who was designated by plaintiffs as the party to whom such conveyance should be made; that thereupon Podratz paid to defendant therefor the total sum of \$8,000, \$1,600 of which is claimed by plaintiffs, for which they pray judgment against defendant.

Defendant's answer was in substance a denial of the allegations of the complaint, except he admits conveying the land to Podratz on February 28, 1907, which he alleges was in pursuance of a sale made direct by him to Podratz for \$8,000, and further alleges that if plaintiffs have any claim against him the same is for commission on the sale, but that he never at any time listed in writing the premises with plaintiffs or either of them, and that they are barred and stopped from maintaining this action on their alleged claim by virtue of chapter 58, p. 110, Laws of 1905, being a part of our statute of frauds.

The cause proceeded to trial before the court without a jury; and at the conclusion of the plaintiffs' evidence, the court dismissed the cause on motion of defendant's attorneys, reciting in its order of dismissal, among other things, the following:

"And the plaintiffs having introduced all their testimony rested their case; thereupon the defendant moved for judgment of nonsuit upon the grounds that the plaintiffs had failed to prove the allegations in their complaint and that the testimony showed conclusively that the suit is a suit for a commission for sale of real property and that no written contract had been entered into by the parties to said suit; and the court having heard the argument of respective counsel and having considered the testimony and being fully ad-

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vised in the law and the premises, hereby grants defendant's motion for judgment of nonsuit."

And thereupon plaintiffs appealed to this court.

Counsel for appellants contend that the trial court erred in rendering judgment in the cause without first making findings of fact and conclusions of law, claiming that the same are necessary to support the judgment under Bal. Code, § 5029 (P. C. § 645), which provides:

"Upon the trial of an issue of fact by the court, its decisions shall be given in writing and filed with the clerk. In giving the decision, the facts found and the conclusions of law shall be separately stated. Judgment upon the decision shall be entered accordingly."

Section 633 of the Code of Civil Procedure of California is in substance identical with this provision, but it is there held that findings are unnecessary in the granting of a nonsuit. *Reynolds v. Brumagim*, 54 Cal. 254. This being a law case, and triable by jury unless trial by the court be consented to, no doubt a judgment granting affirmative relief would need findings of fact, made in compliance with this section, for its support, if proper request therefor be made by either of the parties; but since this judgment of nonsuit is based upon the failure of appellants to prove facts sufficient to entitle them to recover, there are no affirmative facts for the court to find. When the court dismissed the cause upon the grounds of respondent's motion, it did not decide a question of fact; it simply decided, as a matter of law, that the evidence introduced by appellants, treating it as uncontradicted, did not entitle them to judgment. *Thompson v. Myrick*, 24 Minn. 4; *Fleming Cut Sole Co. v. Garretson*, 5 N. Y. Supp. 344; *Golden v. Newbrand*, 52 Iowa 59, 2 N. W. 537, 35 Am. Rep. 257; 8 Ency. Plead. & Prac., 937. We are of the opinion that when a judgment is not based upon some affirmative fact or facts, findings are unnecessary to its support, and the failure of the court to make

findings in such a case, whether requested or not, is not error.

It is next contended that the court erred in holding that the agreement between the parties, as disclosed by the evidence, was within the provision of our statute of frauds, Laws 1905, p. 110, which provides:

"In the following cases, specified in this section, any agreement, contract and promise shall be void, unless such agreement, contract or promise, or some note or memorandum thereof, be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized, that is to say: . . . (5) An agreement authorizing or employing an agent or broker to sell or purchase real estate for compensation or a commission."

There is no evidence whatever offered by appellants showing, or tending to show, any agreement between the parties to this action, or memorandum thereof, in writing signed by any one. Neither was there any evidence in support of even an oral agreement such as is alleged in the complaint to the effect that the respondent agreed to sell the premises to appellants. The most that can be said of appellants' evidence is that it tended to show that they had an oral understanding with respondent that they might find a purchaser for his farm, that he would take \$40 an acre or \$6,400 therefor, but would not pay any commission, and that they might have all over that sum they could sell it for. Thereafter the farm was sold and conveyed by respondent to Podratz, a customer who had been produced by appellants. It is plain that whatever agreement there was between appellants and respondent amounted to nothing more at best than an oral agreement authorizing or employing them as agents for respondent to sell the farm for compensation or commission, and it is therefore clearly within the statute rendering such contract void unless in writing. It is plain that appellants cannot recover in this case even though they may have fully performed the contract which their evidence shows was orally made. *Keith v. Smith*, 46 Wash. 131, 89 Pac. 473.

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Syllabus.

We find it unnecessary to discuss other questions presented, since our conclusions thereon would not change the result whether resolved favorably to appellants or respondent. The judgment of the learned trial court is affirmed.

RUDKIN, C. J., MOUNT, CROW, and DUNBAR, JJ., concur.

[No. 7912. *En Banc*. September 15, 1909.]

JONATHAN GIFFORD *et al.*, Respondents, v. JAMES D. HORTON,
Appellant.¹

NAVIGABLE WATERS—LITTORAL RIGHTS—DEDICATION—SHORE LANDS. The title to shore lands being in the United States, and in the state after the adoption of the constitution, an upland owner, by dedicating a plat covering shore lands on a navigable lake, acquires no title thereto, and none can pass from him by deed or execution sale.

DEDICATION—BOUNDARIES—STREETS BORDERING ON LAKE—FEE—RIGHTS OF PURCHASERS. Where a street in a plat is dedicated along a lake shore to the high water mark, the purchaser of lots abutting on the street acquires the fee to the entire street, subject to the public easement.

PUBLIC LANDS—SHORE LANDS—PREFERENCE RIGHT TO PURCHASE—LOTS ABUTTING ON LAKE FRONT STREET. The purchaser of lots abutting on a street that reaches to high water mark on a lake, has the preference right to purchase the abutting shore lands, by virtue of his ownership of the fee of the entire street.

SAME—STATUTE—CONSTRUCTION. Laws 1897, p. 250, § 45, giving upland owners the preference right to purchase shore lands is a mere gratuity, and is not intended as in lieu of riparian rights.

DEDICATION — RESERVATIONS — CONSTRUCTION — FEE OF STREET — RIGHTS OF PURCHASER—NAVIGABLE WATERS. The fact that the plat-tors in dedicating a street along the shore line of a lake, the center line of which was above high water mark, excepted and reserved to their own use, all water, riparian, and littoral rights, does not show an intent to reserve the fee to a thread of the street upon sale of lots abutting thereon, thereby saving a preference right to purchase the shore lands; nor does the fact that they believed they owned the lands below high water show an intent to reserve the fee to a thread of the street beyond its center line.

¹Reported in 103 Pac. 988.

Appeal from a judgment of the superior court for King county, Griffin, J., entered July 30, 1908, upon stipulated facts, upon an appeal from an award of the state board of land commissioners, in a contest over the preference right to purchase shore lands. Affirmed.

Louis Henry Legg, for appellant, contended, among other things, that a grant of land bordering on a road or river ordinarily carries title only to the center thereof. *Farnham, Waters & Water Rights*, § 724; *Banks v. Ogden*, 2 Wall. 57, 17 L. Ed. 818; *Brisbine v. St. Paul & Sioux City R. Co.*, 23 Minn. 114; *City of Demopolis v. Webb*, 87 Ala. 659, 6 South. 408; *Columbus & W. R. Co. v. Witherow*, 82 Ala. 190, 3 South. 23. The grantee of a lot bordering on a street takes title in the street by presumption of intention only, and according to the intention of the grantor. *Johnson v. Grenell*, 98 N. Y. Supp. 629; *Grant v. Oregon R. & Nav. Co.*, 49 Ore. 324, 90 Pac. 178, 1099; *Haberman v. Baker*, 128 N. Y. 253, 28 N. E. 370; *Dunham v. Williams*, 37 N. Y. 251; *Polson v. Aberdeen*, 44 Wash. 155, 87 Pac. 73; *Watson v. New York*, 73 N. Y. Supp. 1027; *Mott v. Mott*, 68 N. Y. 246. The presumption of intention not to grant beyond the center line of the street, in cases like the case at bar, can be shown by parol evidence. *Watson v. New York*, *supra*; *Graham v. Stern*, 168 N. Y. 517, 61 N. E. 891, 85 Am. St. 694; *Polson v. Aberdeen*, *supra*. The platting of the lots on the opposite side of the street below high water mark, shows an intention not to grant the fee beyond the center line of the street. *Farnham, Waters & Water Rights*, § 724; *State ex rel. Bartlett v. Forrest*, 12 Wash. 483, 41 Pac. 194; *Kenyon v. Knipe*, 2 Wash. Ter. 422, 7 Pac. 854; *Grant v. Oregon R. & Nav. Co.*, *supra*; *Northern Pac. R. Co. v. Scott-Holston Lumber Co.*, 73 Minn. 25, 75 N. W. 737; *Gilbert v. Emerson*, 55 Minn. 254, 56 N. W. 818, 43 Am. St. 502; *Watson v. Peters*, 26 Mich. 508.

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Reeves Aylmore, Jr. and *J. L. Corrigan*, for respondent Simonsen.

Frank C. Park and *H. D. Moore* (*Geo. B. Cole*, of counsel), for respondent de l'Archerie.

John P. Hartman, for intervener.

Frank S. Bayley and *H. A. P. Myers*, *Amici Curiae*.

GOSE, J.—The state, through its proper officers, platted the shore lands upon Lake Union, filed the plat in the office of the commissioner of public lands July 1, 1907, and offered the lands for sale according to law. The appellant, Horton, the respondent Gifford, the respondent Francies R. Day in her own right, and the respondents Smith and Westby, as executors of the will and as devisees of the estate of B. F. Day, deceased, the first two acting severally and the last three acting jointly, claimed the preference right to purchase lots 23, 24, and 25, of block 96, Lake Union shore lands, as platted. The respondent T. de l'Archerie claimed the preference right to purchase lot 23; and the respondent Simonsen claimed the preference right to purchase lots 24 and 25. The several parties filed their applications to purchase according to their respective claims. The several applications were made to the board of state land commissioners, in which the power to sell and convey shore lands is vested by law; and on the 10th day of December, 1907, the board awarded the right to purchase lot 23 to respondent de l'Archerie, and awarded the right to purchase lots 24 and 25 to the respondent Simonsen. The appellant, Horton, and the respondent Gifford appealed from the award to the superior court of King county, and upon stipulation and an order of the court such appeals were consolidated. The case was tried to the court upon a stipulation of facts and certain plats, and the award of the board was affirmed. This appeal was taken by the appellant, Horton, from the judgment affirming the award. Gifford did not appeal.

The facts stipulated in substance are, that on June 22,

1889, one B. F. Day and Francies R. Day, his wife, owned certain community property which they on that day platted into lots, blocks, streets and alleys, as B. F. Day's Eldorado Addition to the city of Seattle, dedicated the streets and alleys to the public use, and filed the plat for record; that the plat was duly accepted by the city; that the dedicators at that time owned the platted land to the line of ordinary high water of Lake Union; that on the easterly side of block 15, Day and wife dedicated a street eighty feet in width, named Lake Union avenue; that the line of ordinary high water on the lake is east of the center line of the street; that lots 23, 24, and 25 in block 96 of Lake Union shore lands, as platted by the state board of land commissioners, are identical with lots 4, 5, and 6, in block 16, as shown upon the Day plat, and are directly in front of lots 16, 17, and 20 of block 15, as shown in the plat of dedication; that on August 24, 1895, Day and wife, being then the owners, conveyed to one Smith lots 1 to 26 in block 15, together with the tenements, hereditaments, and appurtenances thereunto belonging and appertaining, with covenants of seizin free from incumbrances, by a deed of general warranty and by a reference to the plat, which deed was recorded August 31 following; that respondent de l'Archerie, since September 11, 1906, has been the owner in fee of lot 16 in block 15, through mesne conveyances from Smith; that the respondent Simonsen, since July 1, 1907, has been the owner in fee of lots 17 and 20 of block 15, through mesne conveyances from Smith; that the title deeds of both of the respondents contain like recitals, grants, and covenants as the deed from Day and wife to Smith.

It was further stipulated that on the 19th day of October, 1895, a community debt judgment was entered against the Days, and that B. F. Day's one-half interest in lots 1 to 8 inclusive in block 16 was sold on the 23d day of May, 1901, on an execution issued upon such judgment; that on the 13th day of May, 1899, Francies R. Day was adjudged a voluntary bankrupt, and on the 28th day of February, 1900, lots

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1 to 8 inclusive, block 16, were sold by the trustee in bankruptcy; that by mesne conveyances the respondent Gifford owns whatever title passed to the purchaser at the execution and bankruptcy sales; that from and after the filing of the Day plat, lots 4, 5, and 6, block 16, were assessed annually for county, state, and municipal purposes, and that the taxes were paid by the Days until the year 1892; that the tax upon the lots last described for the year 1892 went delinquent, and a certificate of delinquency was issued to King county, which was foreclosed, and a decree entered thereon on the 29th day of September, 1902, directing a sale of the lots, and that they were sold thereon on the 15th day of November, 1902; that the appellant, Horton, through mesne conveyances, is the owner of whatever title passed at such sale, and was such owner before filing his application to purchase; that taxes have been assessed annually against these lots from 1890 to 1907 inclusive, and paid by the appellant and his grantors.

It was further stipulated that B. F. Day died testate and childless on the 24th day of March, 1904, leaving him surviving his widow, Francies R. Day; that by his last will he devised his estate in equal shares to Everett Smith and Marthine Westby; that the will was admitted to probate on the 4th day of October, 1904; that on October 8, 1907, the widow and Everett Smith, devisee, quitclaimed to appellant lots 23, 24, and 25, block 96, and lots 4, 5, and 6, block 16, together with the riparian, littoral and water front rights appertaining to the upland upon which they abut, with the preference right to purchase them from the state. In the stipulation the regularity of the execution and bankruptcy sales are admitted by the respondents; but they do not admit that they passed any title. The appellant denies that any title passed under either of said sales, and the respondents deny that any title passed to the appellant under either the tax deed or the Day and Everett Smith deed.

We have seen that Day and wife owned all the platted land

to the line of ordinary high water of Lake Union, and that the shore line is east of the center of the avenue as it was dedicated. While the dedicators platted all the land they owned, they did not own all the land they platted. In front of lots 16, 17, and 20, block 15, and east of the avenue, they platted shore lands and designated them as lots 4, 5, and 6, block 16, which we have seen are identical with lots 23, 24, and 25, block 96, Lake Union shore lands.

The appellant assigns numerous errors, but they all revolve about his one claim that he is the owner of the upland, and therefore entitled to the preference right to purchase the shore lands upon which they front. The title to the shore lands on Lake Union at the time the plat of dedication was filed, it being navigable, was in the United States, and since the adoption of the constitution in November, 1889, the title has been in the state. It follows, therefore, that the platting and the assertion of title by Day thereto was of no legal force, and that the tax sale under which the appellant claims did not invest him with any title, nor did the execution or bankruptcy sale convey any title to the respondent Gifford. *Seattle & Montana R. Co. v. Carraher*, 21 Wash. 491, 58 Pac. 570; *Eisenbach v. Hatfield*, 2 Wash. 236, 26 Pac. 539, 12 L. R. A. 632; *Brace & Hergert Mill Co. v. State*, 49 Wash. 326, 95 Pac. 278; *Grays Harbor Boom Co. v. Lowndale*, ante p. 83, 102 Pac. 1041; *Blakslee Mfg. Co. v. Blakslee's Sons Iron-Works*, 129 N. Y. 155, 29 N. E. 2.

The plat of dedication executed by Day and wife recited: "That we have this day platted the same as B. F. Day's Eldorado, and we do hereby dedicate to the use of the public forever all the streets and drives shown on said plat, excepting and reserving, however, all the water, riparian, and littoral rights for our own use and benefit." The appellant urges that the exception clause in the dedication, together with the platting of the shore lands lying east of the street, indicate an intention upon the part of Day and wife to reserve the fee to the east half of Lake avenue, that

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through his deed from the wife and devisee he has succeeded to that right, that he is the owner of a thread or narrow strip of upland lying between the center of the avenue and the shore line, wholly within the street, and that he is therefore the upland owner, under the provisions of Laws 1897, pages 250, 252, §§ 45, 46, and entitled to the preference right to purchase the shore lands.

It is contended by the respondents that, when Day and wife conveyed the upland fronting on the avenue, the avenue being the boundary of their land, by a deed of general warranty without reservation, the conveyance carried with it the title to the fee in the entire street, subject only to an easement in the public, and that as owners of lots 16, 17, and 20, in block 15, which abut on the street, they are the upland owners and entitled to the preference right to purchase the shore lands lying in front of their lots.

In the absence of a governing statute or a reservation in the grant, the general rule is that the owner of land on each side of a highway or street owns the fee to the center of the road or street, subject only to the easement in the public. This rule is too well settled to require the citation of authority. Proceeding from the premise that the reservation in the plat of dedication will not be extended by an equitable construction (*Strunk v. Pritchett*, 27 Ind. App. 582, 61 N. E. 973; Elliott, *Roads & Streets* [2d ed.], par. 119) we will try to arrive at the intention of the Days by an examination of the language employed, and the surrounding circumstances. They reserved not the fee in whole or any part of the street, which they could have done by apt words in the dedication, or by a reservation in the deed to Smith, but they reserved "all riparian and littoral rights." We have seen that in this state they had no such rights. In addition to the reservation clause, they platted the shore lands the title to which, as we have seen, was then in the United States. We are, in effect, called upon to declare that the reservation in, and an assertion of title to, that which they did not own in-

licated an intention on their part to reserve a different property which they did own. The true rule is that, under the admitted facts, the grantee of land fronting upon the street takes the fee to the entire street, unless the terms or circumstances of the grant indicate a limitation of its extent to the center of the street. The applicable part of Laws 1897, page 250, § 45, is as follows:

"The owner or owners of lands abutting or fronting upon tide or shore lands of the first class shall have the right for sixty (60) days following the filing of the final appraisal of the tide and shore lands with the commissioner of public lands to apply for the purchase of all or any part of the tide or shore lands in front of the lands so owned."

The appellant urges that this right is given in lieu of riparian rights. There is nothing in the language of the statute indicating such an intention. So far as the statute discloses, it is a mere gratuity given to the upland owner. In commenting on the rule of construction where the owner lays out a street along the margin of his land, in *Taylor v. Armstrong*, 24 Ark. 102, at page 107, the court said:

"But if a highway be laid off entirely upon the land of A, running along the margin of his tract, and he afterwards conveys the land, the fee in the whole of the soil of the highway vests in his grantee. . . . The same rules are applicable to streets in towns and cities."

The same rule is succinctly stated in the syllabi to *Succession of Delachaise v. Maginnis*, 44 La. Ann. 1043, 11 South. 715, in the following words:

"A party who sells the entire estate owned by him up to the line of a public road, or street bordering the river, and beyond which no property susceptible of private ownership exists at date of sale, retains no estate to which the accessory right to future alluvion could attach."

And:

"The intervention of a public road or street does not prevent the owner of the estate adjacent thereto from being considered as the front or riparian proprietor, when nothing

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susceptible of private ownership exists between the road or street and the river."

Treating this question in *Haberman v. Baker*, 128 N. Y. 253, 28 N. E. 370, 13 L. R. A. 611, at page 259, it is said:

"Where the highway has been, as in the present case, wholly made from and upon the margin of the grantor's land, his subsequent grant of the adjoining land should be deemed to comprehend the fee in the whole road-bed; upon the same principle that exists for giving the fee to the center in the other cases. The grantor should be presumed to have intended by his conveyance the full investiture of the grantee with all appurtenant property rights in the highway."

In *In re Robbins*, 34 Minn. 99, 24 N. W. 356, 57 Am. Rep. 40, it was held that, where a street is laid out wholly on the owner's own land and on the margin of his tract so that he owns nothing beyond, the whole of the street opposite a lot bounded on the street passes to the grantee of such lot. In *Johnson v. Grenell*, 188 N. Y. 407, 81 N. E. 161, at page 410, in commenting on the legal effect of a grant of a lot upon a street along the boundary of a grantor's property, the court said:

"The grantees of Mrs. Grenell, in this case, had the right to rely upon the application of the rule that a grantor will not be supposed to have reserved the title to the road bounding a grant of lands, if its control ceased to be of importance to him by reason of his having parted with all of his interest in the lands adjoining it."

The court further stated that the control of the street had ceased to be of importance to the grantor after she had conveyed the adjoining land, but that it was important and essential to the grantee for reasons connected with the full enjoyment of the property. The question also received consideration in *Bissell v. New York Cent. R. Co.*, 23 N. Y. 61, 64, where it is said:

"The idea of an intention in a grantor to withhold his interest in a highway to the middle of the street, after parting

with all his right and title to the adjoining land ought never to be presumed; and all the cases hold that, in such a case, it requires some declaration of such an intention in the deed to sustain such an inference."

In *Blakslee Mfg. Co. v. Blakslee's Sons Iron-Works*, *supra*, it was held that a party claiming under a reservation identical in meaning with the one in controversy was not an upland owner. *Grant v. Oregon R. & Nav. Co.*, 49 Ore. 324, 90 Pac. 178, 1099, cited by the appellant, holds that ordinarily a conveyance of land abutting upon the shore carries with it to the grantee therein all rights incident to the shore land; but, when the conveyance shows the intention of the grantor to reserve the riparian rights, they will not pass to the grantee. In *Mott v. Mott*, 68 N. Y. 246, also cited by the appellant, the land had been conveyed by description by metes and bounds bordering a lane, and the deed also granted the right to use the lane, and the court concluded that the fee to the lane did not pass to the grantee. Other cases cited by appellant announce the rule that, where the dedicator owns to the low water line and sells property abutting on a street, which street is bordered on one side by a navigable river, the purchaser takes title to the center of the street only. Such is *City of Demopolis v. Webb*, 87 Ala. 659, 6 South. 408. *Gilbert v. Eldridge*, 47 Minn. 210, 49 N. W. 679, 13 L. R. A. 411, holds that the platting and conveyance of land in the water beyond the shore line disassociated the riparian rights from the upland, and transferred them to the purchaser of the submerged land. This doctrine, however, recognizes the local law which made the line of low water the boundary; whereas, we have seen that in this state the line of high water is the boundary.

We do not think the fact that the Days believed they owned the shore lands and riparian rights justifies a holding that they intended to reserve the fee to a bare thread of the street. Having conveyed the upland to the street which marked the boundary of their land, the presumption is that

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the grantee was invested with the fee to the entire street, and we do not think that the surrounding circumstances overthrow this presumption. It follows from what we have said that respondents are the upland owners, and the decree will be affirmed.

RUDKIN, C. J., FULLERTON, PARKER, MOUNT, and CROW, JJ., concur.

[No. 7984. Department Two. September 16, 1909.]

O. L. THISLER, *Appellant*, v. W. B. STEPHENSON,
Respondent.¹

LIMITATION OF ACTIONS—REMOVAL OF BAR—CONTRACTS—DEFINITENESS. A written promise to pay the principal of a promissory note for one thousand dollars, held and owned by O. L. T. of Chapman, Kansas, as soon as the promisor is able to spare the money or a reasonable time, sufficiently identifies a note for \$1,006.50 passed between the parties, and is sufficiently explicit to remove the bar of the statute of limitations, under Bal. Code, § 4816, relating to a new promise in writing signed by the party to be charged.

BILLS AND NOTES—CONDITIONS—NEW PROMISE TO PAY WITHIN REASONABLE TIME. Upon a promise to pay a note as soon as the promisor "is able to spare the money, or a reasonable time," is not a promise to pay upon condition, but is an absolute promise to pay within a reasonable time, which has expired after the lapse of nearly three years.

Appeal from a judgment of the superior court for Whitman county, Chadwick, J., entered July 13, 1908, in favor of the defendant, upon sustaining a demurrer to the complaint, in an action on contract. Reversed.

J. N. Pickrell, for appellant.

R. L. McCroskey, for respondent.

MOUNT, J.—The lower court sustained a demurrer to the complaint in this action. The plaintiff stood upon the alle-

¹Reported in 103 Pac. 987.

gations of the complaint and the action was dismissed. Plaintiff appeals.

The complaint alleges in substance that in the year 1891 the appellant sold and delivered a stallion to respondent and his brother for the sum of \$2,000; that thereafter the respondent and his brother paid to the appellant the purchase price of the stallion, less the sum of \$1,006.50, for which sum the respondent, on March 11, 1893, executed and delivered to appellant his promissory note, payable six months after date, with interest at the rate of 1% per month; that said note has not been paid, and that on September the 30th, 1905, the respondent made the following promise in writing:

"Winona, Wash., Sept. 30, 1905.

"Articles of agreement made this date, by and between Wm. Stephenson, party of the first part, and O. L. Thisler, party of the second part, as follows:

"Party of the first part agrees to pay the principal of one certain promissory note of one thousand dollars, without accrued interest. Said note is held and owned by O. L. Thisler, of Chapman, Kansas, and the conditions of this contract is that said note shall not be transferable.

"This contract does not put said note in full force, but I agree to pay said note as soon as I am able to spare the money, or a reasonable time. W. B. Stephenson";

that the note referred to is the note mentioned above, and the only note held by appellant against respondent; that after respondent agreed in writing to pay the principal of said note, and acknowledged the debt evidenced thereon, he has failed and refused to pay the same, and more than a reasonable time has elapsed since the execution of said writing.

It will be noticed that on September 30, 1905, the original indebtedness from respondent to appellant was more than twelve years past due, and was therefore barred by the statute of limitations, Bal. Code, § 4798 (P. C. § 281). The question in the case is, did the writing of September 30, 1905, above quoted, remove the bar of the statute under Bal. Code,

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§4816 (P. C. § 300), which provides that: "No acknowledgment or promise shall be sufficient evidence of a new continuing contract . . . unless the same is contained in some writing signed by the party to be charged thereby."

The rule in this class of cases is stated in *Bank of Montreal v. Guse*, 51 Wash. 365, 98 Pac. 1127, as follows:

"It is well established that, where acknowledgment alone is relied upon, the expression of the acknowledgment must be clear and unequivocal and made with reference to a particular debt which is subsisting at the time. The acknowledgment must be so clear that a promise to pay must necessarily be implied."

And in *Lieberman v. Gurensky*, 27 Wash. 410, 67 Pac. 998:

"An acknowledgment or promise made *after* the bar of the statute creates a new contract. *McCormick v. Brown*, 36 Cal. 180, 95 Am. Dec. 170. When the creditor sues on such new contract, the burden is justly cast upon him to establish the particular debt to which the acknowledgment or promise applies, and mere proof of the acknowledgment or promise is not sufficient. There must be at least the *prima facie* proof that the acknowledgment or promise applies to the particular debt sought to be recovered under the allegations of the complaint. As was said by the supreme court of Colorado in *Sears v. Hicklin*, 3 Colo. App. 331, 33 Pac. 137:

"'Although, after a new promise, the action can be maintained upon the original consideration, recovery can only be had upon the new contract to pay; hence, it must have the necessary elements of a contract. It must be a full recognition of the indebtedness evidenced by the note, and a promise to pay that particular debt. It was very proper that the promise should have been required to be so limited as to apply to the particular note. A general admission of indebtedness would not answer the purpose. The rule is well settled that 'there must not be any uncertainty as to the particular debt to which the admission applies. It must be so distinct and unambiguous as to remove all hesitation in regard to the debtor's meaning.'

"In *Bell v. Morrison*, 1 Pet. 351, Judge Story said:

"'If the bar is sought to be removed by the proof of a new promise, that promise, as a new cause of action, ought

to be proved in a clear and explicit manner, and be in its terms unequivocal and determinate.' ”

The promise in this case meets every requirement of the rule in those cases. There can be no doubt as to the respondent's purpose or intention. The promise was in writing, it was a full recognition of the principal of the debt and the note which is sufficiently described. It was distinct, unambiguous, clear and explicit in reference to the debt which was subsisting at the time. It is difficult to understand how a promise could be made more clear or direct. It reads, “Party of the first part agrees to pay the principal of one certain promissory note,” the note is then described with reasonable certainty, and a condition that the note shall not be transferred. The only possible ambiguity is found in the provision, “This contract does not put said note in full force, but I agree to pay said note as soon as I am able to spare the money, or a reasonable time.” When the whole writing is construed together it is clear that the promise was to pay only the principal and not the whole note principal and interest; or in the words used, this contract does not put said note in *full force*. “I agree to pay said note as soon as I am able to spare the money, or a reasonable time,” this is not a promise to pay upon condition of ability to spare the money, but is an absolute promise to pay within a reasonable time. *Nunez v. Dautel*, 19 Wall. 560, 22 L. Ed. 161; *Williston v. Perkins*, 51 Cal. 554.

This provision of the contract goes only to the time of payment. It does not control the absolute promise to pay. It follows, since there was a promise to pay within a reasonable time, that such time has clearly elapsed under the allegations of the complaint. For nearly three years have passed between the date of the promise and the commencement of this action. Respondent alleges that the promise is not clear nor explicit because it describes the note as “One certain promissory note of one thousand dollars,” whereas the principal of the debt as alleged in the complaint is \$1,006.50.

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If the note were not otherwise described there might be force in this contention, but the particular note is further described as the one "held and owned by O. L. Thisler," and the allegations of the complaint completely identify this particular note. There is therefore no merit in this contention. We are satisfied that the written promise set out in the complaint is sufficient to remove the bar of the statute of limitations, and that the complaint states a cause of action.

The judgment is therefore reversed, and remanded with instructions to the lower court to overrule the demurrer.

RUDKIN, C. J., PARKER, CROW, and DUNBAR, JJ., concur.

[No. 7398. Decided September 24, 1909.]

ALBERT REEKS, *Respondent*, v. SEATTLE ELECTRIC COMPANY,
Appellant.¹

DAMAGES—MEASURE—IMPAIRMENT OF EARNING CAPACITY—INSTRUCTIONS. In an action for personal injuries disabling plaintiff from following his trade, where instructions as a whole plainly limited the damages to impairment of earning capacity, it is not error to refuse a request to instruct that the jury must deduct from his loss what plaintiff might be able to earn in other vocations that were open to him.

DAMAGES—INSTRUCTIONS—ISSUES NOT SUPPORTED BY EVIDENCE. In an action for personal injuries, it is not necessarily reversible error to give an instruction submitting an issue as to a particular item of damages, if any was found by the jury, when there was no competent evidence thereof, although the practice of submitting an issue upon which there is no evidence is not commendable.

DAMAGES—EXCESSIVE VERDICT—LOSS OF LEGS. A verdict for \$25,000 damages for injuries sustained by a carriage maker, twenty-one years of age, capable of earning from \$4 to \$4.75 per day, will not be set aside as excessive, where one of his legs was amputated above the knee, the other was left useless; he had submitted to various operations and endured long and intense suffering, and there was nothing in the record to improperly influence the jury or to indicate passion or prejudice.

¹Reported in 104 Pac. 126.

Appeal from a judgment of the superior court for King county, Griffin, J., entered February 8, 1908, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a passenger in a street car collision. Affirmed.

James B. Howe and *A. J. Falknor*, for appellant, to the point that the verdict was excessive, cited: *Williams v. Spokane Falls & N. R. Co.*, 42 Wash. 597, 84 Pac. 1129; *Id.*, 44 Wash. 363, 87 Pac. 491; *Melse v. Alaska Commercial Co.*, 42 Wash. 356, 84 Pac. 1127; *Reddon v. Union Pac. R. Co.*, 5 Utah 344, 15 Pac. 262; *Waldhier v. Hannibal etc. R. Co.*, 87 Mo. 37; *Missouri Pac. R. Co. v. Dwyer*, 36 Kan. 58, 12 Pac. 352; *Wood v. Louisville & N. R. Co.*, 88 Fed. 44; *Renne v. United States Leather Co.*, 107 Wis. 305, 83 N. W. 473; *Kroener v. Chicago etc. R. Co.*, 88 Iowa 16, 55 N. W. 28; *Bailey v. Rome etc. R. Co.*, 29 N. Y. Supp. 816; *Wimber v. Iowa Cent. R. Co.*, 114 Iowa 551, 87 N. W. 505; *Reynolds v. St. Louis Transit Co.*, 189 Mo. 408, 88 S. W. 50; *Chicago & N. W. R. Co. v. Jackson*, 55 Ill. 492, 8 Am. Rep. 661

Wright & Kelleher, for respondent, to the point that the verdict was not excessive, cited: *Williams v. Spokane Falls & N. R. Co.*, 42 Wash. 597, 84 Pac. 1129; *Roth v. Union Depot Co.*, 13 Wash. 525, 43 Pac. 641, 31 L. R. A. 855; *Reddon v. Union Pac. R. Co.*, 5 Utah 344, 15 Pac. 262; *Waldhier v. Hannibal etc. R. Co.*, 87 Mo. 37; *Missouri Pac. R. Co. v. Dwyer*, 36 Kan. 58, 12 Pac. 352; *Wood v. Louisville & N. R. Co.*, 88 Fed. 44; *Wimber v. Iowa Central R. Co.*, 114 Iowa 551, 87 N. W. 505; *Reynolds v. St. Louis Transit Co.*, 189 Mo. 408, 88 S. W. 50; *Renne v. United States Leather Co.*, 107 Wis. 305, 83 N. W. 473; *Bailey v. Rome etc. R. Co.*, 29 N. Y. Supp. 816; *Chicago & N. W. R. Co. v. Jackson*, 55 Ill. 492, 8 Am. Rep. 661; *Union Pac. R. Co. v. Connolly*, 77 Neb. 254, 109 N. W. 368; *Whitehead*

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v. Wisconsin Cent. R. Co., 103 Minn. 13, 114 N. W. 254, 467; *St. Louis & S. W. R. Co. v. Cleland* (Tex. Civ. App.), 110 S. W. 122; *Ehrman v. Brooklyn City R. Co.*, 14 N. Y. Supp. 336; *Williamson v. Brooklyn Heights Co.*, 65 N. Y. Supp. 1054; *Fonda v. St. Paul City R. Co.*, 77 Minn. 336, 79 N. W. 1043; *Texarkana Co. v. Toliver*, 37 Tex. Civ. App. 437, 84 S. W. 375; *Pittsburgh etc. R. Co. v. Simons*, 168 Ind. 333, 79 N. E. 911; *Alberti v. New York etc. R. Co.*, 43 Hun 421.

RUDKIN, C. J.—On the 3d day of March, 1907, the plaintiff Reeks was severely injured in a collision between two street cars, operated by the defendant company over its line between Fort Lawton and the city of Seattle. This action was instituted to recover damages for the injuries thus received, and from a judgment in favor of the plaintiff in the sum of \$25,000, the present appeal is prosecuted. Negligence on the part of the appellant company was conceded, and there was no claim of contributory negligence on the part of the respondent; so that the only question submitted for the consideration of the jury was the amount of damages to which the respondent was entitled. Error is assigned in the giving and refusing of instructions, and in the refusal of the court to grant a new trial or reduce the amount of the verdict.

The appellant requested the court to charge the jury as follows:

“There is evidence in this case tending to show that plaintiff, who was a carriage maker by trade, has been so injured as to disable him from following that vocation. From this fact alone you are not entitled to conclude that the earning capacity of plaintiff is entirely gone, but it is your duty to determine whether or not other vocations in life are open to him, and if you believe the plaintiff will be, notwithstanding the disablement, able to enter some other vocation and have an earning capacity therein, you are to consider what he would be able to earn therein, and deduct such amount from

any injury or loss he will suffer by reason of being disabled from following his present vocation."

The court instructed the jury substantially as requested, except that instead of directing them to deduct the amount the respondent might be able to earn in other employments from the amount he might have earned in his present vocation, it said: "You may consider such facts in arriving at your verdict." It is now contended that this modification left it optional with the jury to award a recovery as for a total loss of earning capacity even though a total loss was not proved. When the instructions of the court are read in their entirety, this criticism is unfounded. It is not the province of the court to direct the process or method by which juries shall make up or reach their verdicts. So long as the court laid down the proper measure or rule of damages for the guidance of the jury, the law is satisfied; and considering the charge in this case as a whole, the jury could not have been misled. They were plainly given to understand that the respondent was entitled to recover such damages as resulted from the impairment of his earning capacity and nothing more.

The court further instructed the jury that they might include in their verdict such reasonable sums, if any, as they found the respondent had been compelled to expend, "for physicians, nursing, hospital expenses, medicines, dressings, artificial limbs and appliances, by reason of the injury." This instruction was excepted to, and in support of the exception it is contended that no testimony was offered tending to show that the respondent had paid out money or incurred liability for artificial limbs or appliances. The contention that there was no testimony to sustain this particular claim is well founded, but this does not render the instruction erroneous or call for a reversal under the rulings of this court. *Eggleston v. Seattle*, 33 Wash. 671, 74 Pac. 806; *Niemyer v. Washington Water Power Co.*, 45 Wash. 170, 88 Pac. 103. The practice, however, of submitting issues to juries which

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are not supported by any competent testimony is not to be commended.

The last assignment of error is based upon the claim that excessive damages were allowed under the influence of passion or prejudice. The allowance was certainly large, but the injuries were severe and permanent. At the time of the accident the respondent was about twenty-one years of age, a carriage maker by trade, earning \$3.25 per day, and at the time of the trial would have been earning from \$4 to \$4.75 per day as a skilled mechanic, but for this accident. He was of good habits, had a fair education, and bid fair to be successful in his chosen occupation. One of his legs was amputated a few inches above the knee, and the other leg was left worse than useless. He was confined in the hospital for months and was compelled to submit to operation after operation. His suffering was long and at times intense.

There is no fixed standard by which damages in this class of actions may be ascertained. Any attempt on the part of courts or juries to measure the value of human limbs or fix the price of human suffering in dollars and cents is like "trying to count what is not number, and to measure what is not space." Such questions must be left to the sound sense and sober judgment of juries, and courts may not interfere unless passion or prejudice has intervened, or there is no evidence to support the verdict. There is nothing in the record before us to indicate anything of that kind. No improper testimony was admitted or offered, there was no improper comment or statement of counsel, there was no attempt to inflame the passions of the jury or create a prejudice in their minds; in short, nothing occurred at the trial to influence the amount of the verdict except the appearance of the respondent and the simple story of his suffering. We might cite cases from other jurisdictions where verdicts as large or nearly as large were upheld for lesser injuries, but such citations would serve no useful purpose. Suffice it to say, we find nothing in the

record to warrant us in disturbing a verdict which has received the sanction and approval of the trial court.

The judgment is therefore affirmed.

DUNBAR, CROW, PARKER, CHADWICK, and GOSE, JJ., concur.

[No. 7909. Department Two. September 24, 1909.]

JONATHAN MILLS, *Respondent*, v. S. EDWARD KNUDSON *et al.*,
Appellants.¹

FRAUD—IN SALE OF STOCK—PLEADINGS—COMPLAINT—SUFFICIENCY. A complaint states a cause of action for fraud in the sale of shares of corporate stock in that the vendor falsely represented that the corporation was not indebted on certain promissory notes, without alleging that the plaintiffs had paid the notes, or without alleging the value of the stock, or stating in so many words, that it was of less value by reason of liability on the notes.

SAME—MEASURE OF DAMAGES. The measure of damages for falsely representing, on the sale of one-half of the stock of a corporation, that it was not indebted, would be one-half of the amount of the indebtedness.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered October 10, 1908, upon findings in favor of the plaintiff, in an action to recover damages for fraud in the sale of shares of stock. Affirmed.

John L. Dirks, for appellants.

Warren W. Tolman, for respondent.

PARKER, J.—The substance of the allegations of plaintiff's complaint, so far as necessary for our consideration, is as follows: That the defendants are husband and wife, and prior to June 2, 1908, were owners of fifty shares, being one-half, of the capital stock of the Knudson-Winans Company, a corporation existing under the laws of the state of Wash-

¹Reported in 103 Pac. 1123.

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ington; that defendant S. Edward Knudson was duly authorized to sell and dispose of said stock for defendants; that prior to June 2, 1908, plaintiff entered into negotiations for the purchase of said fifty shares of stock, which were continued until that day, when defendant S. Edward Knudson, acting for himself and wife, falsely and fraudulently and for the purpose of inducing plaintiff to purchase said stock, represented to said plaintiff, as a part of said negotiations, that the said corporation was not in any way indebted upon or liable to pay any promissory note or notes whatsoever; that plaintiff believed and relied upon said statement, so made by defendant, and so believing and relying, and induced thereby, purchased all of said fifty shares of stock from defendants and paid therefor \$6,500 in money and property; that defendant S. Edward Knudson was, on and prior to that day, an officer of the corporation, had been actually identified with its business, and the facts as to its indebtedness and liabilities were peculiarly within his knowledge, and that the plaintiff had no knowledge or means of knowledge as to said indebtedness and liability, other than the statements and representations of the defendant S. Edward Knudson; that after the purchase of said stock, and after parting with his money and property in the purchase thereof, plaintiff discovered for the first time, and alleges the fact to be, that said corporation was on said 2d day of June, 1908, the maker of and liable upon three certain promissory notes payable to the Union Savings Bank, in the sum of \$2,046.10 including principal and interest, which the defendants and each of them then and there well knew; that, by reason of the false and fraudulent representations so made, the plaintiff was damaged in the sum of \$1,100; for which sum judgment is demanded against defendants.

To this complaint defendants interposed a general demurrer upon the ground that it did not state a cause of action. The demurrer being overruled, defendants answered, denying only the allegations of the complaint charging de-

fendant S. Edward Knudson with making false representations as to the note indebtedness of the company, the reliance thereon by plaintiff in purchasing the stock, and the damage to plaintiff. A trial before the court without a jury resulted in findings and judgment favorable to plaintiff in the sum of \$1,023.05. Thereafter, defendants' motion for a new trial being denied, they appealed.

Error is assigned upon the overruling of the demurrer to the complaint, by the trial court. It is contended by learned counsel for appellants that the complaint is insufficient in that it does not allege that the company or plaintiff has paid any part of the notes. We do not think such an allegation was necessary, in view of the allegation of the company's liability upon the notes as maker at the time of the sale of the stock to plaintiff. If this allegation be true, then the net resources of the company would be impaired to that extent, before as well as after the payment of the notes.

It is also argued that the complaint is defective in that the value of the stock is not alleged therein, nor is it alleged that the stock was any less in value by reason of the company's liability on the notes. We are unable to agree with this contention. Plaintiff's damage consisted of the amount of the depreciated value of the stock resulting from the existence of this liability, regardless of its total value. The very terms of the sale, agreed to by all the parties, shows it, in any event, had a considerable greater total value than the liability of the company evidenced by these notes; so that the stock sold, being one-half the total capital stock of the company, was affected in its real value to the extent of one-half of this liability. We think this is a correct measure of damage, if the allegations of the complaint be true. Nor do we think it necessary that the complaint should allege, in so many words, that the stock was less valuable by reason of these outstanding notes. That is a conclusion deducible from the facts already alleged in this complaint. We are of the

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opinion that the facts stated in the complaint, if true, entitled plaintiff to recover.

It will be observed from the foregoing review of the pleadings that the only issue of fact involved was as to the alleged false representations made by appellant S. Edward Knudson, and respondent's reliance thereon, in making the stock purchase. Upon these questions of fact the court found against appellants substantially as alleged in the complaint. The correctness of such findings was challenged by appellants, by exceptions duly taken, and the evidence is brought here for our review thereof. We have carefully read all of this evidence and find some considerable conflict therein. There was, however, testimony direct and positive in support of the findings, and we are not disposed to disturb them.

In so far as we deem it necessary to notice them, the other arguments of counsel for appellants upon the merits are disposed of in our remarks upon the demurrer. We conclude the judgment should be affirmed. It is so ordered.

RUDKIN, C. J., MOUNT, DUNBAR, and CROW, JJ., concur.

[No. 7502. *En Banc*. September 25, 1909.]

NATIONAL MILLING & MINING COMPANY, *Respondent*, v.
JAMES PICCOLO, *Appellant*.¹

MINES AND MINERALS — ACTION FOR POSSESSION — COMPLAINT — PLEADING — TITLE. The ordinary allegation of title generally is sufficient in an action to recover the possession of a mining claim, without stating the facts necessary to show a valid location under the mineral laws, which are matters of evidence.

SAME — CLAIMS — DESCRIPTION. Descriptions of a mining claim in location notices and in a complaint are sufficiently definite, where the defendant was not misled and knew the boundaries from plaintiff's long possession.

SAME — ACTION FOR POSSESSION — VARIANCE. In an action to recover possession of a mining claim, in which there is no dispute as to the boundaries, a variance between the descriptions in location

¹Reported in 104 Pac. 128.

notices is not material, where both included the plaintiff's improvements, the claims were marked on the ground, and the boundaries were known to defendant, who was not misled to his prejudice, with- in Bal. Code, § 4949.

SAME—CLAIMS—RELOCATION—STATUTES—CONSTRUCTION. Under Laws 1899, p. 71, § 8, to relocate a forfeited mining claim it is necessary to sink a new discovery shaft or sink the original shaft ten feet deeper; and this requirement is not excused by § 9, provid- ing that the "provision herein relating to discovery shafts shall not apply to any location west of the summit of the Cascade mountains," in case of an attempt to take advantage of a forfeiture.

SAME—UNPATENTED CLAIMS—EJECTMENT—TITLE. In an action to recover possession of unpatented mining claims, the better title pre- vails, and the rule that the plaintiff must recover, if at all, on the strength of his own title does not apply.

SAME—SUPERIOR TITLE. As between two claimants to a mineral location, the better title lies with the one who for years spent large sums of money in a good faith endeavor to develop a mine, even if there was a forfeiture by failure to do assessment work, as against another who entered in the absence of the first claimant with the sole purpose of appropriating the fruits of the other's labor, and who failed to comply with the mineral laws as to relocations; there hav- ing been no abandonment by the first claimant.

Appeal from a judgment of the superior court for Sno- homish county, Black, J., entered November 19, 1907, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to recover the possession of mining claims. Affirmed.

Kirkpatrick & Doty and Morris, Southard & Shipley, for appellant.

J. H. Naylor and Merrick & Mills, for respondent.

FULLERTON, J.—In this action the respondent seeks to re- cover from the appellant the possession of a part of two cer- tain mining claims, situated in the Silver Creek mining dis- trict, in Snohomish county, Washington. The claims in ques- tion were originally located by the respondent's predecessors in interest as early as August, 1887, and from that time until January, 1906, were held and possessed by such predecessors and the respondent without let or hindrance from any one.

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During this period, the possessors ran tunnels, sank shafts, and erected buildings on the property, tending towards its development as a mine, at a cost of upwards of \$10,000.

In January, 1906, the appellant entered upon the territory covered by the respondent's claims and attempted to locate a new mineral claim. As marked upon the ground, his attempted location did not follow the lines of either of the respondent's claims, but crossed the same diagonally, covering a part of the ground of both, but it did include all of the tunnels, shafts, buildings and other works the respondent had put thereon in the way of development; in fact, the notice of location was posted at the mouth of the principal tunnel run upon the claims. Later on in the season he procured a large door by which he closed the mouth of this tunnel, locking the same and excluding the respondent therefrom. Thereafter this action was begun to recover possession, as above stated.

In its complaint, the respondent alleged title, possession and right of possession, and the wrongful entry of the appellant thereon. The defendant admitted the entry, but sought to justify by averring that the ground at the time of his entry was vacant public mineral land, subject to location under the mineral land laws of the United States, and that he had located the same as a mineral claim under such laws; further averring that the respondent had forfeited all of its rights to the same, if any it ever had, by failing to do its assessment work thereon for the year 1905. The affirmative allegations of the answer were denied in the reply. On the issues so made, a trial was had before the court, sitting without a jury, and resulted in findings to the effect that there had been no forfeiture of respondent's location, and consequently the appellant's location was invalid. From the judgment entered on the findings, this appeal is taken.

The appellant first contends that the complaint does not state facts sufficient to constitute a cause of action. It is argued that a plaintiff in an action to recover possession of a mineral claim must allege and prove all of the facts neces-

sary to show a lawful and valid location of the claim, by some person entitled under the laws to make a mineral location, such as the due marking of the boundaries of the claim on the ground, the posting of the notice of location, its recording, and that the locator was qualified under the laws of the United States to make a location. But in an action to recover possession of a mining claim, the complaint need not be different from that required in possessory actions generally. It is sufficient to allege ownership and right of possession, and that the defendant wrongfully entered thereon. Such an averment carries with it all of the facts essential to establish ownership. The means by which the possessor is entitled to the possession are matters of evidence. *Protective Min. Co. v. Forest City Min. Co.*, 51 Wash. 643, 99 Pac. 1033; U. S. Revised Statutes, § 910; 27 Cyc. 644; *Fulkerson v. Chisna Min. & Imp. Co.*, 122 Fed. 782. The complaint in this action was thus definite, and we hold it sufficient.

It is contended further that the description of the claim was insufficient both in the complaint and in the notices of location. Without, however, entering into detail concerning the description, we think the descriptions sufficient, when aided by the respondent's long continued possession. Moreover, it is manifest that the appellant was not deceived or misled by any false or deficient description. It plainly appears that he knew the boundaries of the claims and entered within them for the purpose of acquiring for himself the benefit of the respondent's labor and expenditures, believing that the respondent had forfeited its rights, not in ignorance of such rights, nor for want of a sufficient description of the property in the location notices. The purpose of description is to give notice, and since the appellant had notice, it would seem that he was not in a position to complain of technical defects which in no way affected his rights.

It is next contended that there is a variance between the pleading and the proofs. On the trial of the cause, the respondent introduced an amended notice of location filed in

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1890, which, the appellant contends, contained a description differing from that set out in the complaint and contained in the original notice. But the variation, if any, was not material. The claims were marked out on the ground, and the boundaries were well known to the appellant. His entry was upon territory plainly defined in both locations. It might be that a difference of this character would be material were there a contest over the boundary line between these claims and claims adjoining, but it is not a reason for taking the entire claims from the respondent and awarding them to the appellant. Nor does the fact that the difference was not noticed in the complaint require a reversal of the judgment or a new trial in the court below. By the code, Ballinger's, § 4949 (P. C. § 420), no variance between the allegation in the pleading and the proof is deemed material unless it shall have actually misled the adverse party to his prejudice in maintaining his defense upon the merits. It is idle to say that any such result followed the introduction in evidence of this amended location notice.

The remainder of the assignments of error question the sufficiency of the evidence to justify the findings of the court. The statement of facts is very voluminous, and it would not be profitable to give even a resume of the matters offered in evidence. It is therefore sufficient to say that the evidence in our judgment justifies the findings.

The last question to be noticed is, do the findings of fact justify the conclusions of law. The court's findings show in detail what was done by the respondent towards doing the assessment work for the year 1905. These findings, in our opinion, do not justify the conclusion that the respondent did work enough to save the claims from forfeiture, had a valid location of the ground intervened between January 1, 1906, and the time the appellant ousted the respondent therefrom. But the findings make it clear that no valid location intervened. While the notices were properly posted and the claim properly marked on the ground by the appellant, there is no

finding or evidence that the notices complied with the statute, or that the location was completed by sinking a discovery shaft on the lode of the claim. The statute in relation to the relocation of forfeited claims reads as follows:

“The relocation of forfeited or abandoned quartz or lode claims shall only be made by sinking a new discovery shaft and fixing new boundaries in the same manner and to the same extent as is required in making a new location, or the locator may sink the original discovery shaft ten feet deeper than it was at the date of commencement of such relocation, and shall erect new, or make the old monuments the same as originally required; in either case a new location monument shall be erected and the location certificate shall state if the whole or any part of the new location is located as abandoned property.” Laws 1899, p. 71, § 8.

The appellant, it will be remembered, was attempting to relocate a forfeited claim, not a claim upon vacant mineral land of the United States. To do this, under this provision of the statute, it was necessary that he sink a shaft on the lode of the claim, and state in his location certificate “if the whole or any part of the new location is located or abandoned property.” A mere marking of the ground, and posting notices proper for an original location, was not sufficient. A relocation of a forfeited claim must comply with this section of the statute to be valid.

Section 9 of the act, it is true, provides that the “provision herein, relating to discovery shafts, shall not apply to any mining location west of the summit of the Cascade mountains;” but this does not excuse the sinking of a shaft in a case where there is no discovery, but an attempt to take advantage of a forfeiture. In the latter case the shaft must be sunk to complete the location.

Since, therefore, the appellant did not perfect his location, it remains to inquire which of the parties has the better title. And in determining this question it must be remembered that in possessory actions to recover unpatented mining claims the rule of ejectment, namely, that the plaintiff must recover on

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the strength of his own title and not the weakness of his adversary's, does not apply. In actions of this sort the better title prevails. Thus, it is said in *Strepey v. Stark*, 7 Colo. 614:

"It is further to be observed that the rule in ejectment, that the plaintiff must recover, if at all, on the strength of his own title, and not upon the weakness of that of his adversary, is held not to apply to possessory actions for mining claims, where neither party has, strictly speaking, any legal title, but when the prior possession of plaintiff is pitted against the present possession of the defendant. 'Practically, the real question involved in all such cases is: Which, as against the other, has the better right to mine the land in question?'"

In 27 Cyc. 599:

"Unlike abandonment there is no question of intent involved in forfeiture. The only question is whether the law has been complied with. Abandonment may occur at any time before the issue of patent, while forfeiture, properly speaking, can only occur at stated statutory periods upon the failure to perform the annual representation. Forfeiture is never complete until adverse claims are made to the property under other locations, while abandonment operates instantaneously."

And in *Emerson v. McWhirter*, 133 Cal. 510, 65 Pac. 1036:

"The courts are reluctant to enforce a forfeiture, deeming this class of penalties odious in law."

As between the claimants in the case before us, there can be but little question as to which of them has the superior rights. One who has spent a large sum of money on a mining location, in a good-faith endeavor to develop it into a mine, unquestionably has a superior right to the property over one who enters with the sole purpose of appropriating to himself the fruits of the foresight and labor of the first occupant. Whatever may be said as to a forfeiture of these particular claims, as against a valid subsequent location, there was no abandonment of them. There was at all times a good-faith intent to return and take up the work, and this is a superior title to one who enters without right, in the absence of the first party,

and seeks to appropriate the first party's labor and effects.
Davis v. Dennis, 43 Wash. 54, 85 Pac. 1079.

The judgment is affirmed.

RUDKIN, C. J., GOSE, CHADWICK, MOUNT, CROW, and DUNBAR, JJ., concur.

PARKER and MORRIS, JJ., took no part.

[No. 7943. Department One. September 25, 1909.]

Alice I. French, *Appellant*, v. WASHINGTON TAYLOR *et al.*,
Respondents.¹

TAXATION—FORECLOSURE—PARTIES—ACTION TO SET ASIDE—COMPLAINT—SUFFICIENCY. Under the statute, a tax foreclosure proceeding against community real property need not be brought against both husband and wife; and a complaint by a wife to set aside such a foreclosure for want of service on the husband does not state a cause of action where it fails to affirmatively show want of service upon the person whose name appears on the assessment roll as the owner.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered October 17, 1908, upon sustaining a demurrer to the complaint, dismissing an action to recover possession of real property. Affirmed.

Howard Waterman and Smith & Cole, for appellant.

James Hart and Jay C. Allen, for respondents.

FULLETON, J.—Alice I. French brought this action to recover possession of a certain parcel of real property situated in King county. A demurrer to the complaint was interposed and sustained, and on her election to stand on the complaint, judgment of dismissal and for costs was entered against her. From the judgment she appeals.

In her complaint the appellant alleged that the property in

¹Reported in 104 Pac. 125.

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question was, on and prior to November 16, 1901, the community property of herself and her then husband, the respondent C. H. French; that they were divorced on that date by the decree of the superior court of King county, in which decree no mention was made of this particular parcel of real property; that for some years prior to the year 1900, they had suffered the taxes on the property to become delinquent, and on June 25, 1900, a certificate of delinquency for taxes for the years 1892 to 1896, inclusive, was issued by the county treasurer to the respondent Washington Taylor; that Taylor thereafter paid the taxes on the property for the years 1897, 1898 and 1899, the total sum so paid being \$257.31. That thereafter, and on or about August 30, 1900, Taylor began an action against the appellant and her then husband, C. H. French, to foreclose his certificate of delinquency, and served notice of his application to foreclose, on her personally, but failed to serve her husband with notice of the application; that an attempt was made to serve him by publication, but such attempted service was void for the reason that it did not comply with the statute governing the service of summons by publication in force at that time; that on December 31, 1900, a judgment of foreclosure was entered in the proceedings against both herself and her husband, and thereafter the property was sold under such judgment and purchased by the respondent Taylor. It was further alleged that the appellant had tendered to the respondents all taxes paid by him, with interest, penalties and costs, but that such tender was refused. It was not alleged, however, in whose name the property was assessed upon the assessment rolls of King county, whether in the name of the appellant or some one else, nor can any inference be drawn from the facts alleged that the appellant herself was not named on the assessor's rolls as the owner of the property.

The appellant contends that the complaint alleges sufficient facts to show the invalidity of the tax foreclosure proceedings

under which the respondents claim title. She argues that since the property in question was, at the time the foreclosure proceedings were had, the community property of herself and her then husband, no foreclosure of a tax lien thereon could be legally made without joining both herself and her husband in the proceedings, and serving each of them with notice of the proceedings; and since her husband was not served with such notice, the attempted foreclosure was void *in toto*, and she can recover possession of the property in this action.

Unquestionably, it is the rule in this state that both husband and wife are necessary parties to any proceeding brought to foreclose a lien upon their community real property which by the statute must be brought against the owners of the property, and unless both spouses are made parties to such a proceeding, and served with process, the proceeding is void. This rule was announced in the early case of *Littell & Smythe Mfg. Co. v. Miller*, 3 Wash. 480, 28 Pac. 1035, and has been adhered to with substantial uniformity ever since. *Powell v. Nolan*, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389; *McNair v. Ingebrigtsen*, 36 Wash. 186, 78 Pac. 789; *Sloane v. Lucas*, 37 Wash. 348, 79 Pac. 949.

But it is not necessary in this state, in order to make a valid foreclosure of a certificate of delinquency for taxes, that the proceedings be brought against the owners of the property on which the tax is a lien. By express provisions of the statute, and by the repeated holdings of this court, such a proceeding may be prosecuted against the actual owners of the property, or against the person whose name appears upon the assessment roll as the owner, and that a foreclosure proceeding against either, if regular, is valid. *Carney v. Big- ham*, 51 Wash. 452, 99 Pac. 21; *Rowland v. Eskeland*, 40 Wash. 253, 82 Pac. 599; *Allen v. Peterson*, 38 Wash. 599, 80 Pac. 849.

The appellant's complaint, as we have shown, does not negative the presumption that due service of process was made on the person to whom the land was assessed on the

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assessment roll of the county. This was necessary we think in order to state a cause of action. Since the land was sold for taxes, the appellant was compelled, in order to state a cause of action under our somewhat peculiar statute, to show the invalidity of that sale, and to do so it was necessary, inasmuch as she relied upon want of service to establish the invalidity of the tax sale, to show there was no service upon any person upon whom service would give validity to the judgment. This the complaint does not do; it shows want of service upon the owners of the property, but does not show that service was not had on the person to whom the property was assessed upon the assessment rolls of the county. The complaint therefore does not state a cause of action.

The judgment is affirmed.

RUDKIN, C. J., GOSE, CHADWICK, and MORRIS, JJ., concur.

[No. 8159. Department One. September 25, 1909.]

OSCAR CAIN *et al.*, *Appellants*, v. MILES C. MOORE,
Respondent.¹

ATTORNEY AND CLIENT—EMPLOYMENT—CONSTRUCTION OF CONTRACT—COLLECTION OR COMPROMISE—PERFORMANCE—EVIDENCE. Where attorneys are employed by a stockholder in a bank to bring action against the bank for an accounting for alleged undivided profits, under an agreement that the client would pay them ten per cent on the amount collected "in case of a compromise" of the suit, and not to exceed \$200 "in case of settlement by sale or exchange of the stock," and after suit brought, it was dismissed by the client upon receiving \$14,833 in cash and certain shares in another bank in exchange for his shares, the attorneys, in an action for their services, are entitled to show that the market value of the shares received was equal to the market value of the shares exchanged, and that the transaction was in fact a compromise of the suit by a cash payment, within the meaning of their contract of employment, entitling them to ten per cent of the collection.

¹Reported in 103 Pac. 1130.

SAME—LIABILITY—FRAUD. In such a case, it would not be necessary for the attorneys to plead or prove fraud on the part of their client.

SAME—EVIDENCE—NATURE OF COLLECTION—VALUE OF STOCK EXCHANGED. To determine whether or not the client collected a pecuniary consideration on the compromise, over and above the value of the stock given in exchange, the stock must be taken at its market value and not at its actual value by reason of the undivided profits to collect which the suit was instituted.

ESTOPPEL—RETENTION OF CHECK. The retention for a few days of a check given as payment in full to attorneys upon the client's statement of the case, until the attorneys could ascertain the nature of the settlement, will not estop them from bringing action for a larger sum due them on their contract of employment by reason of the nature of the settlement.

EVIDENCE — CONTRACTS — AMBIGUITY — EXTRANEOUS EVIDENCE. A contract to pay attorneys ten per cent of any sum collected "in case of a compromise" and not to exceed \$200 "in case of a settlement by sale or exchange of stock," is not so ambiguous as to admit of explanation by what the client said at the time such clause was added as an amendment to the original contract.

Appeal from a judgment of the superior court for Walla Walla county, Brents, J., entered December 11, 1908, in favor of the defendant by direction of the court, after sustaining a challenge to the evidence, in an action on contract. Reversed.

Dunphy, Evans & Garrecht, for appellants.

T. P. & C. C. Gose, for respondent.

FULLERTON, J.—In August, 1908, the respondent was the owner of thirty-five shares of the capital stock of the First National Bank of Walla Walla. At that time he conceived the idea that the bank had made large earnings which had not been properly accounted for, and that, upon a proper accounting, a large sum would be found to be due him in virtue of his ownership of the shares of stock mentioned. He was desirous of bringing an action to procure such an accounting, and to that end employed the appellants as attorneys for that purpose. The contract of employment was reduced

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to writing, and is in the form of a letter from the attorneys addressed to the respondent, the material parts thereof being as follows:

"In regard to your suit against the First National Bank and others we agree to prosecute the case upon the following terms: In case the matter proceeds to trial and we recover nothing, we will charge you \$200. On any sum recovered less than \$5,000 we will charge you 20 per cent and 5 per cent on any additional amount. In case of a compromise we will charge you 10 per cent of the amount paid you. In case of settlement by sale or exchange of stock not to exceed \$200."

After the contract had been entered into, an action was begun by the respondent, through the appellants as his counsel, whereupon one W. P. Winans, a director of the First National Bank, approached the respondent with a view to settling the action without the necessity of a trial. After several interviews he asked the respondent to make a proposition for settlement, and thereupon the respondent offered to exchange his thirty-five shares of stock in the First National Bank, at a valuation of nine hundred dollars per share, for thirty-three and one-third shares of stock in the Baker-Boyer National Bank of Walla Walla, at a valuation of five hundred dollars per share, and take the difference in money. This proposition was accepted, and shortly thereafter, through Mr. Winans and another representative of the bank, an exchange of the stock was made, the respondent assigning his shares of stock to the Kirkman Investment Company, of which Mr. Winans was president, and receiving therefrom the shares of stock in the Baker-Boyer National Bank, and \$14,893.34 in the form of a certified check drawn by the Kirkman Investment Company on the First National Bank. At the same time the respondent gave to the bank's representatives the following receipt:

"Received of the Kirkman Investment Company the sum of Thirty-One Thousand Five Hundred (\$31,500) Dollars in full payment for thirty-five shares of stock in the First National Bank of Walla Walla, and in full settlement of all

claims and demands, against the said First National Bank of Walla Walla, against any and all of its funds and accounts, and against any and all of its officers and employes."

Thereafter the respondent directed the appellants to dismiss the suit against the bank, at the same time sending them his check for two hundred dollars. The appellants dismissed the action as directed, and kept the check until they learned the terms and conditions on which the action had been settled, when they returned the check to the respondent and demanded the sum of \$1,400, claiming the amount as due them under that clause of the contract relating to a compromise of the action against the bank. This demand being refused, they began the present action to recover the sum demanded.

On the trial, the foregoing facts appearing, the appellants sought to show that the exchange of stock made by the respondent with the representatives of the bank was in reality a compromise of his suit against the bank; that the market value of the stock he received in exchange for the stock he held in the First National Bank was practically of the same value as the stock exchanged for it, and that the sum paid in cash, although nominally paid by the Kirkman Investment Company, was actually paid by the First National Bank, and was paid by it in settlement of the action brought against it, and for no other consideration. It having appeared in the record that the contract as originally submitted did not contain the clause with reference to a sale and exchange of stock, and that this clause was added at the respondent's request, he stating at the time his reason for making the request, the appellants further offered to show the reason given by the respondent for desiring the contract changed. The court denied the several offers of proof, and ruled, as a matter of law, that the transaction between the respondent and the representatives of the bank was an exchange and sale of stock within the meaning of the last clause of the contract, and that the appellants were entitled to only the sum named therein as attorney's fees. The appellants then rested their case,

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whereupon the court sustained a challenge to the sufficiency of the evidence, and directed judgment for the respondent.

The court, in making the several rulings above recited, seems to have been of the opinion that it was not competent for the appellants to question the nature of the transaction between the respondent and the persons with whom he settled his controversy with the bank; that they were obligated to accept those proceedings at what they purported to be upon their face, and were not permitted to inquire into their real nature. This interpretation of the contract between the parties we hardly think is tenable. The contract itself, when read as a whole, is not obscure. Its obvious meaning is that the respondent was to pay nothing in excess of two hundred dollars as attorney's fees in case he obtained no pecuniary advantage by reason of the action brought against the bank; that if the action proceeded to trial and nothing was recovered, or if the respondent should sell or exchange his shares of stock in the bank and receive no pecuniary advantage thereby, then two hundred dollars was to be the gross sum he was required to pay the appellants as attorney's fees. On the other hand, if anything was recovered after trying out the action, or if the respondent compromised the case and received a pecuniary consideration over and above the market value of the property he gave up in the compromise, the appellants were to recover a per centum of that value.

Within this view of the contract, it was competent for the appellants to show, if they could, that the value the respondent received for the stock in the sale and exchange was in excess of the value he gave for the property. It would be some proof of this fact to show the market values of the stock exchanged, that the Kirkman Investment Company, who apparently purchased the stock, paid no part or only a part of the cash difference given in the exchange, and that this sum, or some part of it, was paid by the First National Bank in compromise of the suit the respondent had instituted against

it. The appellants were not required to plead and prove fraud on the part of the respondent in order to be permitted to show these matters. The intent of the respondent is not material. If the facts sought to be proven exist, the appellants are entitled to recover, no matter what the respondent's purpose may have been. He is liable to the appellants for the per centum agreed to be paid, if he in fact received in the sale or exchange made with the representatives of the bank a sum in excess of the value of the stock exchanged, and this, whether he made the exchange with the Kirkman Investment Company or with the First National Bank.

We think, also, that in determining whether the respondent received a pecuniary consideration over and above the value of the stock he gave up in the exchange, the market value of the stock must be taken as its actual value. It is true the respondent believed that there were large sums earned by the bank which had been retained by it, and that the actual value of the stock was in excess of its apparent or market value, and consequently believed that the actual value of his stock was greatly in excess of its market value. But this excess was the subject-matter of the action against the bank. It was this he brought the action to recover, and it was a per centum of this sum he agreed to pay as attorney's fees in case of a recovery, and he cannot escape his agreement by showing that he gave the stock in exchange at a value based upon the existence of the undivided earnings.

The appellants are not estopped from maintaining this action by the fact that they failed to return the check for several days after it had been sent them with notice that the respondent had settled the action against the bank. If they were obliged to return it at all, they had a reasonable time in which to inquire into the facts of the settlement, and it is not in evidence here that there was any abuse of this right.

The evidence offered tending to show what was said by the respondent when the written contract was amended was prop-

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erly rejected. The contract is not ambiguous, and extraneous evidence is not required to explain its meaning.

For the errors noticed the judgment appealed from is reversed, and a new trial awarded.

RUDKIN, C. J., CHADWICK, GOSE, and MORRIS, JJ., concur.

[No. 7692. Decided September 25, 1909.]

S. IVERSON, *Appellant*, v. A. V. BRADRICK, *Respondent*.¹

APPEAL—PARTIES—SERVICE OF NOTICE. Upon appeal by plaintiff from a judgment in favor of a garnishee, the defendant is not the "prevailing" party upon whom it is necessary to serve notice of the appeal.

CORPORATIONS—STOCKHOLDERS—LIABILITY—SUBSEQUENT CREDITORS—TRANSFER OF STOCK—RECORD—EVIDENCE—SUFFICIENCY. A stockholder in an insolvent corporation is not liable to a creditor for unpaid stock subscriptions, where it appears that he sold his shares while the corporation was a going concern and solvent, before the creditor acquired his claim, and that the stock books and the certificate stubs show the transfer according to the usual custom of the corporation, although it did not keep a stock ledger or strictly comply with Bal. Code, §§ 4261, 4269, concerning the record of transfers of stock; since subsequent creditors stand in the same situation as the corporation.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered June 6, 1908, in favor of the garnishee defendant, upon sustaining a challenge to the sufficiency of the evidence at the close of plaintiff's case, after a trial on the merits before the court. Affirmed.

Perkins & Honefenger and *S. Iverson*, for appellant.

H. M. Stephens, for respondent.

CROW, J.—On February 10, 1908, the plaintiff, S. Iverson, obtained a judgment in the superior court of Spokane county against White Pine Lumber Company, a corporation, upon

¹Reported in 104 Pac. 130.

which an execution was issued and returned *nulla bona*. Thereafter the plaintiff filed an affidavit alleging that A. V. Bradrick was indebted to the White Pine Lumber Company, and obtained a writ of garnishment against Bradrick. The garnishee defendant, answering, alleged that he did not, at the time of the service of the writ, or at any time since, have in his possession, or under his control, any property or effects of the judgment debtor. This answer being denied, the cause came on for hearing on the evidence and the issues thus raised. At the close of the plaintiff's evidence, the garnishee defendant challenged its sufficiency. The challenge being sustained, final judgment was entered in Bradrick's favor, from which the plaintiff has appealed.

The respondent has interposed a motion to dismiss, contending that the notice of appeal was not served upon the White Pine Lumber Company, the judgment debtor. It was served upon the respondent as the prevailing party. The White Pine Lumber Company is not a necessary party to this appeal, the issues before us arising exclusively between the appellant and the respondent as garnishee. *Sipes v. Puget Sound Elec. R. Co.*, 50 Wash. 585, 97 Pac. 723; *Wilson v. Puget Sound Elec. R. Co.*, 50 Wash. 596, 97 Pac. 727. The motion to dismiss is denied.

The controlling question before us is whether the respondent's challenge to the sufficiency of the evidence was properly sustained. The appellant's contention is, that the respondent subscribed for 100 shares of the capital stock of the White Pine Lumber Company; that he paid for 80 shares only; and that he was still indebted to the corporation in the sum of \$2,000, his entire subscription for the remaining twenty shares. The respondent urges several reasons for sustaining the judgment of dismissal. We only find it necessary to discuss his contentions that he is not a stockholder, that he has not been one at any time since February, 1904, and that he is not indebted to the corporation for any unpaid stock subscription.

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Assuming for the purposes of this appeal that respondent never paid any part of his subscription for the twenty shares, although he contends that he made payment in full, we find the undisputed facts to be, that in 1901 he originally subscribed, and later paid for, 80 shares of the capital stock, of the par value of \$100 per share; that in March or April, 1902, the capital stock of the corporation was increased; that he then subscribed for twenty additional shares; that a certificate for 100 shares was then issued to him; that later it was cancelled; that two new certificates for fifty shares each were issued to him in lieu thereof; that thereafter, in February, 1904, he, for a valuable consideration, then paid, sold, indorsed and delivered these two certificates to one W. J. Harris, who in March, 1904, caused them to be delivered to the corporation for cancellation; that the stock book of the corporation contains the cancelled certificates, and also shows the stub of a new certificate issued to Harris; that at the time of respondent's sale to Harris, the corporation was a going and prosperous concern, but that its milling plant was afterwards destroyed by fire; that the appellant acquired the claim on which his judgment was entered, after respondent ceased to be a stockholder, and that his claim was not based on any prior obligation, liability or debt of the corporation. Upon these facts the respondent contends that, even though the subscription for the twenty shares of stock still remains due and unpaid, he has been released from liability therefor, being no longer a stockholder, and that the corporation or its creditors must look to Harris as his vendee for the subscription.

The appellant contends that while the stock transfer may be valid as between the respondent and his vendee, it is not sufficient in law to release the respondent from liability to the corporation or its creditors for his unpaid subscription, the stock not having been transferred upon the corporation books in strict compliance with the requirements of Bal. Code, §§ 4261, 4269 (P. C. §§ 7063, 7070). The stock certificate book unquestionably shows that respondent's certificates were

surrendered to the corporation and cancelled by it, but the appellant's contention on the trial was, and now is, that the corporation did not, in compliance with § 4269, *supra*, keep a stock ledger containing the names of all stockholders alphabetically arranged, the number of shares owned by them respectively, and the times when they acquired their stock. It was not shown that any such book was ever kept or owned by the corporation. It does appear, however, that it had a book of stock certificates and stubs, from which it could be readily ascertained who were stockholders at any particular time, how many shares each person held, and when they became stockholders. This book contained indisputable evidence of the fact that respondent's certificates had been surrendered to the company and cancelled. Thus it not only appeared that the respondent in fact sold his stock to Harris in February, 1904, but that the company had ratified the sale by entries on its books, in that it transferred the stock by the only and usual method it had adopted for making transfers. The corporation was thereafter estopped from collecting any subscription from the respondent Bradrick. It could only pursue Harris his vendee, notwithstanding the fact that it failed to keep a stock ledger in strict compliance with § 4269, *supra*. The appellant, as a subsequent judgment creditor of the corporation, is no more entitled to enforce such subscription against the respondent than is the corporation itself.

"A transfer of stock, even if irregular, accepted and acquiesced in by the corporation, is binding upon it. Or, if a particular method of transfer has been adopted by the company through custom or use, or by general acquiescence of the shareholders, the company would be equally bound. This is beyond controversy." *Stewart v. Walla Walla Print. & Pub. Co.*, 1 Wash. 521, 20 Pac. 605.

See, also, *Van Horn v. New Western Shingle Co.*, *ante* p. 117, 103 Pac. 42; 10 Cyc. 700, 701.

Considering the above authorities and the facts found, we

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conclude that from and after March, 1904, the respondent ceased to be liable for any unpaid stock subscription.

The judgment is affirmed.

RUDKIN, C. J., MOUNT, DUNBAR, GOSE, FULLERTON, and CHADWICK, JJ., concur.

MORRIS and PARKER, JJ., took no part.

[No. 7807. Department Two. September 25, 1909.]

OLIVE A. PEDERSON *et al.*, Appellants, v. SKAGIT COUNTY,
*Respondent.*¹

BRIDGES—NEGLIGENCE—EVIDENCE—SUFFICIENCY. A county is not guilty of negligence from the fact that the sweep at the center of the draw span of a bridge was placed in position for use in emergency, pointing diagonally across the bridge, three feet from the floor, without any light thereon, the night being dark, and which resulted in the death of a person running across the bridge, where the bridge was closed to traffic and in jeopardy from high water, and the deceased had been warned off the bridge and knew of the emergency and that the draw span might be opened at any time.

SAME—CONTRIBUTORY NEGLIGENCE. In such a case, the deceased was guilty of contributory negligence in running against the sweep, and assumed the risks, where others crossing the bridge at the same time saw the sweep and avoided it, the way was dark requiring caution, and he was not in the walkway prepared for footmen.

Appeal from a judgment of the superior court for Skagit county, Joiner, J., entered May 28, 1908, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action for wrongful death. Affirmed.

Million, Houser & Shrauger, for appellants.

Augustus Brawley, for respondent.

MOUNT, J.—The appellants are the surviving wife and minor children of Halvor Pederson, deceased. They brought

¹Reported in 103 Pac. 1125.

this action to recover damages for the death of Halvor Pederson, caused by the alleged negligence of the respondent. The case was tried to the court without a jury, and at the close of the trial the court found that respondent "was guilty of no act or acts of negligence by which decedent lost his life," and "that decedent was guilty of contributory negligence, and that he lost his life by reason thereof." The cause was thereupon dismissed, and the plaintiffs have appealed.

The assignments of error are all based upon the facts, and the case is presented here for review of the facts by this court. They are briefly as follows: The Skagit river runs south through the city of Mount Vernon, in Skagit county. It divides the city into two parts, these parts are connected by a bridge something over 900 feet in length by 18 feet in width in the clear. This bridge is maintained by the county and forms a public highway for the citizens of Mount Vernon. Near the center of the bridge is a drawspan about 270 feet in length. This drawspan swings on a large pier located in the river, and is operated by a gearing located in the middle of the span. This gearing is operated by hand power, by use of a beam called a sweep, which sweep is about 8 feet long, the handle or small end of which is round and about one and one-half or two inches in diameter. At the four corners of the drawspan, where the same connects with the bridge at each end of the span, are jacks which are used to lift the ends of the span from the stationary bridge when it is desired to open the draw. These jacks are also operated at the center of the drawspan by a hand lever. Dikes have been constructed along both banks of the river for the purpose of protecting the city from overflow in times of high water in the river.

For a day or two previous to the 15th day of November, 1906, the water in the Skagit river had been rising, and on that day was very high. The dikes were full and the bridge was in a dangerous condition. Driftwood and jams were continually forming on the protective pier of the drawspan,

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and men were employed to work with saws and dynamite in order to save the bridge from damage. About 4 o'clock in the afternoon of that day the bridge was closed to traffic for teams, and chains were hung across the approaches to the drawspan. People who were loitering upon the bridge were warned to keep off because of the dangerous condition of the bridge. The chains above mentioned were frequently released by people who congregated on the bridge. About 7 o'clock in the evening of that day, the jacks were raised so that the drawspan might be readily opened in case a jam or floating objects should strike the drawspan. A line was fastened to the drawspan in order to swing the draw back into place in case that should become necessary. The sweep used to operate the drawspan was also placed into position so that it might be used without delay in case of an emergency.

The deceased, Halvor Pederson, lived with his family on the west side of the river. On the evening of November 15, 1906, in company with four other men, he left his residence for the purpose of examining the dikes on the east side of the river. The party crossed the bridge about 7:30 p. m. The chains were not up at that time and the sweep was not in position. Soon after that time, the deceased, while standing upon the bridge, was notified to keep off. A little later, while running across the drawspan of the bridge, and at about 8 o'clock, the deceased came in contact with the end of the sweep, which struck him in the groin or side, causing internal injuries from which he died the following day. The sweep was pointing diagonally across the bridge at the time. The upper or small end of the sweep was about three or three and one-half feet from the floor. There was but one stationary electric light on the bridge at that time. This light was located at or near the west end of the drawspan. Two of the employees on the bridge carried lanterns. There was no light at the sweep. The night was dark but the sweep could be seen a distance of four or five feet away. There was a walk two feet wide for footmen on the south side of the draw-

span. The deceased was thoroughly familiar with the bridge, and the condition of the water in the river, and the work that was being done at that time.

It is contended by the appellant that the respondent was negligent because the sweep mentioned was placed in the middle of the drawspan without a light and was therefore a dangerous obstacle. If the ordinary condition had existed there at this time, and the bridge had been open to travel, this contention would have much force. But an extraordinary condition existed at the time, for which the respondent was not responsible. The bridge was closed to traffic for the reason that it was in jeopardy. The drawspan was in readiness to be opened at any time, or to open itself by driftwood or other floating obstacles striking against it. When it was generally known that the drawspan was likely to open at any time without warning, and when persons were warned to keep off the span, as the deceased was, we think it was not negligence for the respondent to fail to hang a lantern on the sweep, and that persons using the bridge, knowing the conditions, did so at their own risk. This would preclude a recovery against the respondent.

We are furthermore of the opinion that the court was right in finding that the deceased was guilty of negligence himself. The evidence shows that the deceased was running at the time he was injured. It also shows that at least two other persons were near the sweep and saw it at the time the deceased was injured. They also saw the deceased run against the sweep. One or two other persons walking on the span shortly before or after the time of the injury saw the sweep in time to avoid it. The deceased was injured by reason of the fact either that he was running and could not avoid the sweep, or because he did not look when he might have seen it. In either event he was negligent because he knew that he was in a place of danger. He was not on the walkway prepared for footmen. The way was dark and it was therefore his duty to use more caution than under normal conditions.

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It may be true that he was not warned against, and did not have in mind, this particular danger, but it was also true that he was warned generally to keep off the bridge and no particular dangers were pointed out, he therefore assumed all of the dangers which confronted him.

We have not followed the arguments made in the brief because we think either one of the points above considered is conclusive of the appellant's right to recover in the case. The judgment must therefore be affirmed.

RUDKIN, C. J., DUNBAR, PARKER, and CROW, JJ., concur.

[No. 7964. Department Two. September 25, 1909.]

GUS CONRAD, *Appellant*, v. JOHN W. GRAHAM & COMPANY,
Respondent.¹

EXPLOSIVES—CONTRIBUTORY NEGLIGENCE—INTOXICATION OF VENDEE—INSTRUCTIONS. Upon the defense of contributory negligence, in an action for injuries caused by the explosion of a dangerous chemical sold by the defendant, and where there was evidence that the plaintiff had been drinking prior to the accident, it is proper to instruct that the plaintiff could not recover if the jury find that he was intoxicated and thereby prevented from using his senses and knowledge and that in consequence he was injured, when he would not have been if sober or in the exercise of reasonable care.

SAME—SALE OF EXPLOSIVES—NOTICE. In an action for personal injuries caused by the explosion of a chemical sold by defendant to plaintiff, notice to plaintiff's messenger, to whom the same was delivered, that the chemical was of a more dangerous kind than the one ordered, is notice to the plaintiff.

SAME—CONTRIBUTORY NEGLIGENCE—NOTICE—WARNING. Where plaintiff was experienced in the use of flashlights and knew that only magnesium could be used in a magazine lamp, defendant is not liable for injuries caused by an explosion of another kind of chemical, sold to plaintiff, and which he attempted to use in his lamp, if defendant gave plaintiff's messenger notice that the chemical was more

¹Reported in 103 Pac. 1122.

dangerous than magnesium, and plaintiff, by the exercise of reasonable care, would have seen and read cautions on the package against the use of such chemical in a magazine lamp.

TRIAL—INSTRUCTIONS. It is not error to refuse requested instructions covered in the general charge.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered December 12, 1907, upon the verdict of a jury rendered in favor of the defendant, dismissing an action for personal injuries. Affirmed.

Robertson & Rosenhaupt and *John B. Hart*, for appellant.
Post, Avery & Higgins, for respondent.

MOUNT, J.—The appellant was injured on December 31, 1903, by the explosion of a magazine lamp which he was at that time attempting to use for the purpose of making flashlight photographs. He alleged in his complaint, that on the afternoon of that day he sent a messenger to the respondent's store to purchase a particular kind of flashlight chemical, and that there might be no mistake as to the character of the chemical, he wrote a description thereof on a card as follows: "Magnesium metal for Rex magazine lamp," which card was handed to respondent's clerk; that the respondent sold and sent to appellant another kind of chemical which was much more dangerous than the kind ordered, and that appellant or his agent was not informed of that fact; that by reason thereof appellant was severely injured.

The respondent, by its answer, denied that it furnished flashlight chemicals of any kind to the appellant, or any one for him, and alleged that appellant's injury was caused by his own negligence, and that he assumed all risk of using the chemicals which caused his injury. The case was tried to a jury, and a verdict was returned in favor of the respondent, and a judgment of dismissal followed. The appellant alleges that the court erred in instructing the jury as follows:

"Or if you find that the plaintiff while handling such chemicals was under the influence of intoxicants or was thereby

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prevented from using his senses and knowledge, that he was injured in consequence, and that he had such knowledge of such chemicals that if he had been sober and had exercised reasonable care he would not have handled the chemicals as he did and would not have been injured, the plaintiff could not recover."

It is argued that this instruction was error because there was not sufficient evidence to warrant an instruction upon the question of intoxication of the appellant, and, also, that the instruction emphasized the question of intoxication, and was not a true statement of the law. We think the instruction is not subject to these criticisms. There was evidence that the appellant had been drinking prior to the time of the accident. One of the defenses was that the appellant was himself negligent. It seems too plain for argument that if the jury found that the appellant was under the influence of intoxicants and in consequence thereof was injured, and if the jury found that had appellant been sober and used reasonable care he would not have handled the chemicals as he did and would not have been injured, he could not recover even if the respondent was negligent, and this is in substance what the jury were told. It may be that the mere fact of drunkenness was not sufficient to show contributory negligence. The court did not say to the jury it was, but said that if in *consequence thereof* the appellant was prevented from using his senses and was injured on that account he could not recover. This was without doubt a correct statement of the law. This is not in conflict with the rule in *Lawson v. Seattle & Renton R. Co.*, 34 Wash. 500, 76 Pac. 71. The instruction was not erroneous.

It is next claimed that the court erred in instructing the jury to the effect that, if they found that notice was given to the messenger sent by the respondent to purchase the chemical that such chemical furnished was not magnesium but another more dangerous chemical but would answer as well, such notice was notice to the appellant. It is argued that this instruction presupposes that notice was given to the

messenger that the article furnished was not the article ordered. We need not consider whether this instruction does presuppose such fact, because the fact was not a disputed one. It was assumed from the beginning of the case that the chemical furnished to Mr. Jauslan, who acted as messenger for the appellant, was not the article ordered, and Mr. Jauslan understood that fact and was told, "This will do the work." The case was tried upon the theory that Mr. Jauslan was informed that the article he purchased was not the article he ordered. We think there can be no doubt that notice to Mr. Jauslan was notice to the appellant that the chemical delivered was not the chemical ordered. *Fowler v. Randall*, 99 Mo. 407, 73 S. W. 931, 17 Am. St. 580, and cases there cited.

It is next claimed that the court erred in instructing the jury,

"If you find that notice was given to Jauslan as I have already instructed you, and you further find that the chemical delivered to Jauslan was labeled cautioning that it be not used in a magazine lamp, and that the plaintiff saw and read, or if he had exercised reasonable care would have seen and read such caution, and notwithstanding such caution plaintiff nevertheless did use such chemical in a magazine lamp, and was injured in consequence thereof, he cannot recover from the defendant, and your verdict would be for defendant."

It is admitted that the appellant was an experienced man in photography with flashlight chemicals, and he knew that only magnesium could be used in a magazine lamp such as he was using, and he also knew that such packages were usually labeled. Under these circumstances the instruction was clearly right. It did not assume any disputed fact and was not a comment thereon, and was certainly within the issues of the case.

It is argued that the court erred in refusing to give several instructions requested by the appellant. The record shows that the substance of all these instructions was given, and that is all that is required. Several errors are based on the

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ruling of the court on the question of evidence during the trial. There is no merit in any of these assignments; they are not of sufficient importance to justify extended consideration. The trial of the case seems free from error, and upon a consideration of the whole case, we think the verdict of the jury was right. The judgment is therefore affirmed.

RUDKIN, C. J., DUNBAR, CROW, and PARKER, JJ., concur.

[No. 7971. Department Two. September 25, 1909.]

SPOKANE CANAL COMPANY, *Appellant*, v. HENRY M.
COFFMAN *et al.*, *Respondents*.¹

VENDOR AND PURCHASER—CONTRACT—CONSTRUCTION—INDEPENDENT COVENANTS—RESCISSION—FORFEITURE. An agreement by the vendor, contained in a contract for the sale of land, to furnish water from its ditches at \$1.50 per acre per year, commencing at a time in the future, is an independent covenant, and defaults in payment due on the purchase price entitle the vendor to a rescission, upon the thirty days' notice stipulated for, without a showing that the water had been furnished; especially where the independent nature of the covenants is shown by the fact that the defaults occurred before the time had arrived to furnish water.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered September 22, 1908, dismissing at the close of plaintiff's evidence, an action to rescind contracts for the sale of land, to quiet title and for damages, after a trial before the court without a jury. Reversed.

Happy & Hindman and *Gallagher & Thayer*, for appellant.

John M. Gleeson, for respondents.

MOUNT, J.—On August 21, 1906, the appellant and respondents entered into two separate written contracts, by

¹Reported in 103 Pac. 1106.

each of which the appellant agreed to sell, and the respondents agreed to buy, ten acres of land in Spokane county, "together with water for said land in the proportion of one cubic foot of water per second of time for 200 acres of land." The purchase price for each ten-acre tract was \$3,000, \$20 payable in cash, and \$745 on or before September 21, 1906, the balance was to be paid in three equal annual payments, with interest thereafter at the rate of eight per cent. The contract provided that the appellant should furnish the water for irrigating the said lands "between the first day of May and the first day of October of each year from the canal ditches and laterals of the parties of the first part (appellant) beginning with the year 1907." The respondents agreed to pay, in addition to the purchase price of the lands, \$1.50 per acre per year for the maintenance of the irrigation works and canals, and to pay all taxes and assessments chargeable against the land. Time was expressly made the essence of the contract, and upon default of any of the payments, appellant, upon thirty days' notice, might cancel the contract. The first payment of \$20 was made at the date of the contract upon each thereof, and thereupon respondents took possession of the land. Payments due on August 21, 1906, were not made, but on August 24, 1906, the original contracts were modified in writing so that respondents agreed to pay \$20 per month on the first of each month for the first year, and thereafter \$25 per month on each contract until the purchase price was fully paid. Respondents thereafter paid \$52.50 on the contracts and no more.

On September 1, 1907, when the respondents were a year in default in their payments, they were notified that, unless payments were made as agreed, the contract would be cancelled in accordance with the terms thereof. No payments were subsequently made, and on October 11, 1907, respondents were notified in writing that the contracts were cancelled. Soon thereafter respondents requested permission to remove their crops from the land, and this permission was

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granted. Thereafter respondents refused to vacate the premises, and appellant brought this action to rescind the contracts, and for possession of the premises and to remove the cloud of the contract from the title, and for damages and general relief. The complaint set out copies of the contract, and alleged that the appellant "has performed all the terms and conditions of the contract that were to be kept and performed." The answer admitted certain allegations of the complaint and denied others. It specifically denied that the appellant,

"had performed all the terms and conditions of the contract that were by it to be kept and performed, and particularly that portion of said contract found on p. 1, which is as follows: 'It is further agreed and understood that water for the irrigation of said described land shall be furnished between the first day of May and the first day of October of each year from the canals, ditches, and laterals, to the parties of the first part, beginning with the year 1907.'"

The answer contains some alleged affirmative defenses which are not necessary to be considered. The case came on for trial to the court without a jury. At the conclusion of the plaintiff's evidence, the court made the following order:

"The defendants having moved the court to dismiss said cause on the ground that the plaintiff did not show by its evidence that it had furnished defendants water at the rate of one cubic foot per second of time for 200 acres of land, and the court having heard the argument in the case, it is ordered, adjudged and decreed, that said motion for the reasons stated be and the same is hereby granted, and the plaintiff's cause be dismissed without prejudice to any action at law arising out of or concerning the subject-matter referred to in the complaint in this action."

The court was clearly in error in dismissing the action. As we read the evidence, undisputed as it is, it seems to show that the required amount of water was furnished substantially as agreed upon, but conceding that the evidence does not so show, we are of the opinion that it was not necessary for

the appellant to prove that fact in order to recover, because the agreement to furnish the water from May to October, beginning with the year 1907, was clearly an independent covenant upon which the promise of respondents to pay did not depend.

In *Crampton v. McLaughlin Realty Co.*, 51 Wash. 525, 99 Pac. 586, we held that covenants to put in sidewalks and other improvements contained in a contract for the sale of real estate were independent covenants. The rule in that case is decisive of this. In this case the promise to pay the purchase price of the land did not depend upon the promise to furnish water at stated times. The latter promise is to be performed after the purchase price is fully paid. It was an independent continuing covenant. The fact that the covenant to furnish water was to be performed before all the payments were made was a mere coincidence. The payments were not made dependent thereon. The appellant had delivered possession of the land to the respondents under the contract. The water right followed the land. The delivery of the land to the respondents was a performance of the contract upon the part of the appellant which entitled it to the payments as agreed. The payments agreed upon were long past due, and the contract by its terms was subject to forfeiture before the appellant was required to furnish any water. If the appellant had given notice of the cancellation of the contract before the 1st of May, 1907, as it clearly had a right to do, it could not then have been said that the contract could not be cancelled because no water had been furnished, because the time for furnishing the water had not then arrived. This shows clearly that the time of the payments and the furnishing of water were not dependent upon each other, that they were independent covenants. It was therefore not necessary to allege or prove that the water was furnished. Furthermore, on the 1st of May, 1907, the respondents were eight months in default in their payments, they were therefore in no position to complain if no water

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was furnished, because the appellant was not bound to furnish water or to specifically perform the contract while the respondents were in default. The record shows that they are still in default under the contract, and unless a new contract has been entered into extending the time of payment, or waiving the payments past due, appellant is clearly entitled to a judgment of rescission and for possession of the land.

The judgment is reversed and the cause remanded for further proceedings.

RUDKIN, C. J., PARKER, CROW, and DUNBAR, JJ., concur.

[No. 7978. Department Two. September 25, 1909.]

WALTER C. HAYWARD, *Respondent*, v. RUTH MASON,
Appellant.¹

WATERS AND WATER COURSES—IRRIGATION—GRANTS—CONSTRUCTION—EASEMENTS. A deed granting "the right of way for a water ditch" across certain lands "to carry water for irrigating purposes," with the right of ingress and egress to keep the ditch in repair, creates an easement only.

SAME—RIGHTS CONVEYED. The grant of a right of way for a ditch to carry water for irrigation does not prevent the grantor from using the same ditch without interfering with the grantee's use, where the grant does not appear to be exclusive, and the ditch had theretofore been used in common.

SAME—IRRIGATING DITCH—OBSTRUCTIONS—DAMAGES. The grantee of an easement for an irrigating ditch cannot recover for loss of crops by reason of obstructions placed in the ditch by the grantor, where all the water the grantee was entitled to was allowed to flow past the obstructions.

Appeal from a judgment of the superior court for Kittitas county, Preble, J., entered November 25, 1908, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action for an injunction. Affirmed.

¹Reported in 104 Pac. 139.

Fred Parker and O. O. Felkner, for appellant.

Hovey & Hale, for respondent.

MOUNT, J.—The respondent brought this action to restrain the appellant from destroying dams in an irrigation ditch. The appellant claimed the exclusive right to the use of the ditch for irrigating purposes. The case was tried to the court without a jury, and findings were made to the effect that each had a right to use the ditch for a certain amount of water for irrigating purposes, and thereupon the court entered a decree restraining each of the parties from interfering with the other. The defendant has appealed.

It appears that the respondent is the owner of the south half of the southeast one quarter of section 11, township 18, N., R. 17, E. W. M., being 80 acres of land in Kittitas county; that the appellant is the owner of a tract of land lying to the east of respondent's land; that a large irrigation canal runs across the southwest corner of respondent's land. This canal is known as the West Side Irrigating Company's canal. It is owned by a stock company. Each stockholder is entitled to a certain amount of water. Both respondent and appellant own stock in the company, and are entitled to water on account thereof. A ditch has been dug along the south line of respondent's land, which ditch extends from the southeast corner to a point near the middle of the tract of land where the ditch connects with an old natural water channel. This natural channel extends some distance within respondent's land, and continues by a circuitous route around a hill to a point near the West Side Irrigating Company's canal where another ditch connects this natural water channel with said canal. This natural canal and the ditches connected with it have been used for many years for irrigating and draining the respondent's land, and also for irrigating appellant's land. In June, 1900, the respondent by written instrument conveyed to the appellant a right of way

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for water from the West Side Irrigating Company's canal, as follows:

"That said party of the first part for and in consideration of the sum of \$1 to him in hand paid by the party of the second part, the receipt of which is hereby acknowledged, has granted, bargained and sold, and by these presents does grant, bargain and sell and convey unto said party of the second part and their successors in interest in (certain described lands) the right of way for a water ditch across the south half of the southeast one quarter of section 11, in said township and range, to carry water for irrigation purposes from the canal of the West Side Irrigating Company up the side now occupied by said water ditch through the tract aforesaid, together with the right of ingress to and egress from the last described tract, in order to maintain and keep the said ditch in repair."

It is contended by the appellant that this is a grant of the fee, and that the respondent thereby conveyed the exclusive right of the ditch to the appellant. It seems clear that the grant was simply an easement and nothing more. It does not purport upon its face to convey the land upon which the ditch is located, or convey the ditch itself. It conveys, "*The right of way*" for a definite and limited purpose.

"In the case of an express grant the fact of the creation of the easement, as well as its nature and extent, is determined by the language of the deed, taken in connection with circumstances existing at the time of making it." 10 Am. & Eng. Ency. Law (2d ed.), p. 411.

The evidence in this case shows that, at the time the grant was made, the part of the ditch known as the natural water course had been used for irrigating the respondent's land for years, and was necessary therefor, and that for some six years subsequently the appellant and respondent used the whole water course and ditch in common; that each was entitled to a certain amount of water from the West Side Irrigating Company, and that this ditch was large enough to carry all of the water available for the use of both appellant and respondent. There is nothing in the deed, or in the cir-

cumstances existing at the time it was made, to indicate that the right of way granted was an exclusive one. On the other hand, the circumstances indicate the grant was not exclusive. In such cases the rule is that,

“The owner of the servient estate may use his property in any manner and for any purpose consistent with the enjoyment of the easement. Thus in the case of a way the owner of the servient estate may use the land over which it passes in any manner which does not materially impair or unreasonably interfere with its use as a way. He may use it as a way or permit others to do so unless the ownership of the easement is exclusive.” 14 Cyc. p. 1208.

The lower court therefore did not err in holding that the respondent might use the ditch and natural waterway for irrigation so long as he does not interfere with the easement granted. It is claimed that the court erred in not assessing damages in favor of the appellant on account of crops lost by reason of obstructions which respondent placed in the ditch. There is evidence in the record which shows that all the water to which appellant was entitled was permitted to flow past these obstructions, no loss therefore could occur on that account. We think the trial court was justified in refusing to assess damages.

There is no error in the record and the judgment must therefore be affirmed, and it is so ordered.

RUDKIN, C. J., PARKER, CROW, and DUNBAR, JJ., concur.

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[No. 7979. Department Two. September 25, 1909.]

WALTER C. HAYWARD, *Respondent*, v. RUTH MASON,
Appellant.¹

ACTIONS—CONSOLIDATION—JOINDER. The court has discretion to consolidate two equitable actions between the same parties relating to the same subject-matter, *i. e.*, the obstruction of two irrigation ditches, which might have been joined in one action.

WATERS AND WATER COURSES—DRAINAGE—GRANTS—EASEMENTS—RIGHTS OF GRANTOR. A deed conveying a right of way for a drainage ditch along a line as at present laid out to drain off surplus water onto the grantor's land, with the right of ingress and egress to keep the ditch in repair, creates an easement only; but gives the grantor no right to control the drainage.

SAME—RIPARIAN RIGHT—MARSH OR SWAMP. Riparian rights cannot be asserted to the flow of surplus waters of a swamp or marsh which has no outlet, and where there is no natural stream or waterway.

SAME—EXTENT OF RIGHTS—PRIORITY. A riparian right to the flow of water is subject to a reasonable use for domestic and agricultural purposes by a prior riparian owner.

SAME—IRRIGATING DITCH—OBSTRUCTIONS—DAMAGES. The grantee of land with appurtenant water rights cannot recover damages to crops by reason of the grantor's obstructions and diminution of the water supply, when the volume was not reduced below what it was at the time the deed was given.

Appeal from a judgment of the superior court for Kittitas county, Preble, J., entered November 25, 1908, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in consolidated actions to enjoin the obstruction of drainage ditches. Affirmed.

Fred Parker and *O. O. Felkner*, for appellant.

Hovey & Hale, for respondent.

MOUNT, J.—In the year 1904 the respondent brought an action against the appellant alleging that she was unlawfully obstructing a drainage system upon respondent's land, and

¹Reported in 104 Pac. 141.

prayed that she be restrained from so doing. While that action was pending and undetermined in the lower court, the respondent constructed other drainage ditches upon his own land, and brought another action against appellant alleging that appellant was unlawfully obstructing these ditches, and prayed for injunctive relief. When both cases were at issue the trial court entered an order consolidating them. They were thereafter tried as one case. Upon the trial the court made findings of fact and conclusions of law, and entered a decree defining the rights of the respondent to drain his land and to irrigate parts thereof, and also defining the rights of the appellant to certain drainage water and ditches upon respondent's land for irrigating her own land. The defendant has appealed from that decree.

Fifty-one assignments of error are made in the appellant's brief. These assignments are not noticed. But appellant makes the following contentions: first, that the court erred in consolidating the two actions; second, that by certain deeds respondent conveyed not only the right to all water upon his land to the appellant, but also the fee of the ditches upon his land; third, that the appellant owns the riparian right to all the water upon respondent's land; and fourth, that the court erred in not awarding damages to the appellant. We shall briefly notice these contentions in the order stated.

(1) Courts of equity are vested with discretionary powers to consolidate causes, and such discretion will not be reviewed except for abuse. 8 Cyc. 593. In *Peterson v. Dillon*, 27 Wash. 78, 67 Pac. 397, this court said at p. 85:

"A court should always be possessed of the power to make orders which will expedite its business and prevent costs and a multiplicity of suits when one action will answer all the purposes of justice. . . . The consolidation is within the discretion of the court, even if the parties are not the same in each action, and the court's order will not be interfered with by the appellate court if the suit involve the same subject-matter."

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In this case the parties were the same and the subject-matter was the same. The ditches involved were different. But the rights of the parties to drain and use the water was the real subject-matter, and that was the same in both actions. There can be no question that if the actions had been begun at the same time the causes might have been joined in the same complaint. This is one of the usual tests for consolidation. There is, therefore, no merit in the contention that it was error to consolidate the two actions.

(2) It appears that the appellant purchased her land from the respondent. The deed recited that the land was conveyed with the rights thereto belonging or appertaining "including all ditches and water rights," except certain reserved rights not in controversy. This deed was executed in February, 1900. On June 16, 1900, the appellant by deed conveyed to respondent

"A right of way for the maintenance and operation of a drainage ditch across the S. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of Sec. 12, township 18 north, range 17 E. W. M., along the line as at present laid out for the purpose of draining surplus water from the S. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of Sec. 11, in said township and range."

The first description above is of the appellant's land. The latter is the description of the respondent's land. The appellant's land lies to the east of the respondent's land, and is separated therefrom by a county road. The deed continues,

"It is expressly understood and agreed that the said party of the second part [respondent] shall have the right of ingress to and egress from said first described tract for the purpose of draining and repairing drainage ditches aforesaid. It is further understood and agreed as a part of the consideration of this conveyance that the said party of the second part shall so maintain and operate said drainage ditches as in no way to hinder or prevent the proper cultivation of the tract through which the right of way is hereby granted. It is also agreed and understood that first party [appellant] shall have the right to use such drainage water for the irriga-

tion of their tract of land in sections 12 and 13, in said township and range, and water may be diverted from such ditch for such purpose by means of any appliances furnished or to be furnished by any of the parties hereto."

It is apparent that the deed from the respondent to the appellant did not convey the fee to any ditch upon land not conveyed. Water rights then upon or appurtenant to the land conveyed no doubt passed, and the trial court so found and decided. It is also apparent that the deed of June 16, 1900, above largely copied, conveyed to the respondent an easement, "Along the line as at present laid out" upon appellant's land "for the purpose of draining surplus water from" respondent's land. *Hayward v. Mason*, ante p. 649, 104 Pac. 139. But the appellant had a right to use this drainage water upon her own land for irrigation purposes. She did not thereby acquire the right to go upon the land of respondent and control the manner of drainage. The evidence is conclusive that a portion of respondent's land required drainage, that appellant's land required irrigation, and it was agreed that the surplus water should be drained from respondent's land to and upon appellant's land and there used for irrigation. Appellant, however, could no more control the method of drainage upon respondent's land than the respondent could control the method of irrigation upon appellant's land. The appellant was entitled to the water which naturally flowed upon her land when she bought it from respondent, and to no more.

(3) We think the evidence fails to show any riparian right in the appellant, because there is no natural stream or waterway shown in the case. The evidence shows that a marsh or swamp with no outlet existed upon respondent's land. There is some evidence that a depression or possibly an outlet once existed, but such outlet had long since been obliterated, and the only outlet now existing or which has ever been used by the appellant is an artificial one. But if the appellant may be said to be a riparian proprietor and en-

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titled to the flow of water as it was wont, her use would be subject to the reasonable use by the respondent for domestic and agricultural purposes, for he is also a riparian owner prior in time and right. 26 Cyc. p. 979.

(4) Appellant argues that the court should have assessed damages in her favor for the loss of crops caused by a diminution of water by the respondent. The court found, and the evidence justifies the finding, that the respondent has not reduced the water supply below what it was at the time the appellant purchased her land from respondent. In other words, that the appellant at all times had had all the water to which she was lawfully entitled. The respondent was therefore not liable in damages for the failure of appellant's crops for lack of sufficient water.

The judgment of the trial court appears to be right, and is therefore affirmed.

RUDKIN, C. J., PARKER, CROW, and DUNBAR, JJ., concur.

[No. 7884. Department Two. September 25, 1909.]

J. A. MEYERS, *Appellant*, v. W. H. GERHART *et al.*,
Respondents.¹

REPLEVIN—ACCESSION—LOGS—CHANGE OF FORM—GOOD FAITH. Replevin does not lie for the product of sawlogs cut into lumber and commingled by an innocent purchaser with its own property, without notice that the vendor had trespassed and cut the logs on plaintiff's land.

PRINCIPAL AND AGENT—NOTICE TO AGENT—IMPUTED KNOWLEDGE. Knowledge of the vendor's servant that logs sold had been wilfully cut and converted by the vendor, cannot be imputed to the vendee from the fact that the vendee afterwards employed the same servant to take out part of the logs, the knowledge having been acquired in the service of the vendor and not communicated to the vendee.

REPLEVIN—ACCESSION—LOGS—LOSS OF IDENTITY—LACHES OF OWNER. Where the owner of converted logs stood by without making

¹Reported in 103 Pac. 1114.

any claim until after they were manufactured into lumber and sold by an innocent purchaser, he cannot maintain replevin for the product, or for a like quantity of other product.

REPLEVIN — RELIEF — ISSUES — FATAL VARIANCE — CONVERSION. An action of replevin must fail when the plaintiff fails to show that the property is wrongfully detained by the defendant, and incidental relief cannot be given upon showing a conversion, as that would be a fatal variance.

Appeal from a judgment of the superior court for Stevens county, Carey, J., entered May 25, 1908, in favor of the defendants, notwithstanding a verdict for the plaintiff, after a trial on the merits, in an action of replevin. Affirmed.

Slater & Allen, for appellant.

Danson & Williams and *Jesseph & Grinstead*, for respondents.

PARKER, J.—This is an action of replevin. By his complaint, plaintiff alleges in substance, that on September 12, 1907, and for a long time prior, he was and still is the owner and entitled to the possession of 149,764 feet, board measure, of lumber, and 44,800 lath, of the total value of \$3,395.61, which was then, and at the commencement of the action, in the possession of the defendants, at the sawmill heretofore known as the Meyers Falls Lumber Company sawmill, near the town of Meyers Falls, in Stevens county; that on or about September 13, 1907, he demanded possession of said lumber and lath from the defendants, which they refused and still refuse to deliver to him; and they wrongfully detain the same, to his damage in the sum of \$100. Judgment is prayed for in the usual form, in the alternative, and also for \$100 damages for the wrongful detention. The answer of defendants is in substance a denial of the material allegations of the complaint.

The action was commenced on October 31, 1907, at which time the plaintiff, by delivering to the sheriff affidavit and bond in usual form, caused the sheriff to take into his posses-

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sion, from the possession of the defendants, lumber and lath approximately of the quantity claimed in his complaint, which was thereafter returned to defendants by the sheriff upon re-delivery bond being furnished by them. The cause proceeded to trial before the court and a jury. At the conclusion of the plaintiff's evidence, and also at the conclusion of all the evidence, defendants' counsel challenged the sufficiency of the evidence to entitle plaintiff to recover, and moved the court to withdraw the case from the jury and render judgment for defendants, which motion was denied; the court at the same time expressing doubts as to plaintiff's having pursued the proper remedy. The jury returned a verdict in favor of plaintiff, finding that he was entitled to 149,381 feet of lumber and 44,800 lath, finding the total value thereof to be \$2,629.77, and that plaintiff was damaged \$100. Thereafter defendants, by their attorneys, moved the court to set aside the verdict and render judgment in their favor notwithstanding the verdict, which the court granted, and rendered judgment accordingly, from which the plaintiff has appealed.

The facts which are necessary for our consideration are either admitted or conclusively proven, and may be summarized as follows: Appellant bases his right to recover upon the alleged wrongful taking from his land by the Meyers Falls Lumber Company and by respondents, of sawlogs which he claims have been converted into lumber and lath in the quantity alleged in his complaint, though it is not claimed that the lumber and lath manufactured from appellant's logs can be identified, nor that the lumber and lath taken by the sheriff was produced from his logs. During the summer and fall of 1906, the Meyers Falls Lumber Company was engaged in logging from the land of L. W. Meyers, the father of appellant, from whom it had purchased the standing timber thereon. Appellant is the owner of land adjoining and immediately to the north, with standing timber thereon. While cutting and removing the timber so purchased from

L. W. Meyers, the employees of the Meyers Falls Lumber Company went over the line and cut trees into logs, upon the land of appellant, and removed practically all of them, with logs taken from the land of L. W. Meyers, to the sawmill, where they became so intermingled as to entirely lose their identity.

The sawmill was running in the fall, up until November 5, when it stopped for the year. A considerable portion of the logs, irrespective of where they came from, had then been sawed into lumber, and some of the lumber had been shipped out to market before December 8, 1907, on which date the Meyers Falls Lumber Company sold out to respondents, conveying to them all the remaining lumber and loose logs. One Gray had been foreman for the Meyers Falls Lumber Company, and whatever knowledge it had of the cutting of logs upon the land of appellant was only such as could be imputed to it by reason of such agency. After the sale to respondents, Gray continued for a time to act as foreman for respondents, and in removing the remainder of the logs to the mill from the land of L. W. Meyers, caused to be removed to the mill a few remaining logs from appellant's land which had been cut before the sale. It is not claimed that any trees upon appellant's land were cut down after the sale. The identity of these few logs thus became lost as the others had. This occurred during December immediately following the sale.

Neither of the respondents had any knowledge of any of the logs having come from appellant's land until after their identity had become entirely lost, the first information received by them being by a letter from appellant, dated January 18, 1907, wherein he claimed that the logs had been taken from his land by the Meyers Falls Lumber Company, and that the same were then in the log ricks or lumber yards of respondents, as successors of that company, and notifying them that he would claim the product from his timber in whichever form it might be. No demand was made in the let-

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ter for any logs or lumber. In April, 1907, appellant says he ascertained the amount of logs taken from his land, by measurement from the stumps and tops of the trees left on the ground, and that he found the quantity of logs taken was such that lumber and lath, of the quantity alleged in his complaint, could be manufactured therefrom.

About April 1, 1907, the mill again started sawing the logs into lumber. On June 15, 1907, appellant notified respondents by letter of the amount of the lumber and lath he had ascertained the logs taken from his land would make, and claimed the same was worth \$3,398.33. No demand was made for lumber or lath, though this letter might be construed as a demand for the value, as he states therein: "I shall expect a settlement of this account soon." At that time, according to his own statement, all of the logs from his land had been sawed into lumber. Appellant never made demand for any logs, but on September 12, 1907, made his first demand for the lumber and lath he seeks to recover by this action. Thereafter, on October 31, this suit was commenced and seizure made by the sheriff. Just what proportion the logs from appellant's land bore to the whole quantity of logs they were commingled with, is not very certain, but appellant estimates the whole at 2,000,000 feet or more; so, according to his own figures, the quantity from his land was a comparatively small part of the whole. We have no evidence in the record as to the kind of lumber the logs from appellant's land were sawed into, other than his own statement, or rather opinion. The following from his cross-examination embodies the substance of his knowledge on that subject:

"Q. Do you know . . . how much of it was cut into finishing lumber? A. I do not. Q. Do you know how much was cut into flooring? A. I do not. Q. How much was cut into ship-lap? A. I do not. Q. Into siding? A. No, sir. Q. And how much into common lumber? A. No, sir. Q. You don't know anything about that? A. No, sir; only the average cut that such timber would make. Q. And that it might be manufactured into this quality? A. Yes, sir. Q. As a matter of fact

the Gerhart-Bradrick Lumber Co. [respondents] had three different yards at Meyers Falls, didn't they? A. They did. Q. Do you know into which particular yard your lumber went? A. Not in any one yard, no. The clear lumber and high grades went into one, the second qualities went into the other and the rest went into another. Q. As a matter of fact you knew all of this at the time you made that demand? A. Yes, sir. Q. That it was impossible for the Gerhart-Bradrick Company to have segregated out any logs that came from your land, and that it was impossible to segregate any lumber that came from those logs? A. Yes, sir."

Respondent Bradrick, while testifying as a witness for appellant, said they took over from the Meyers Falls Lumber Company approximately 750,000 feet of logs, which, according to appellant's estimate of the whole, was less than half. The balance, more than half, was evidently sawed into lumber before the sale. He also testified, while a witness for appellant, that this lumber was being shipped out during the winter months, and that in the spring of 1907 they had the yards quite well cleaned of lumber, and also continued to ship after the starting of the mill in the spring. He could not say that there was any lumber in their yards on September 12, the time of the demand, which came from the 750,000 feet of logs taken over from the Meyers Falls Lumber Company.

The principal contention of the learned counsel for appellant, as we understand them, is that the original taking of the logs from appellant's land, mingling them with other logs, and manufacturing them into lumber, was willful and with full knowledge of the invasion of his rights; and therefore the fact that his timber was thus changed in form, and the value thereof increased, did not change the title to the property, so as to destroy his right to recover possession thereof; and even though the identity of the property is lost, he has the right to recover property of the kind and quantity into which it was converted, though it may be physically other property, in whole or part.

We will not enter into the question of the knowledge and

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willful invasion of appellant's rights by the Meyers Falls Lumber Company, but, for the sake of argument only, assume that it did invade appellant's rights with full knowledge thereof as he claims; for he is not in this action seeking to recover anything from the Meyers Falls Lumber Company, but from these respondents as their successors in interest. We think, so far as the rights of respondents are to be measured by the innocent or willful acts which involved them in this controversy, it is their own knowledge and their own acts which are to be considered. If we were dealing with the question as if appellant was seeking to recover from the Meyers Falls Lumber Company, conceding it willfully committed the trespass, and the identity of the property was not lost, or that it went into a common mass, all of which was of the same in kind and quality, and still in its possession at the commencement of the action, the matter would be comparatively easy of solution in appellant's favor, under the general rule that,

"Title to chattels is not changed by bestowal of labor or skill upon them, by a willful wrongdoer, in manufacturing them or changing them into a commodity of another kind. No matter how great the transformation may be, the true owner may follow and reclaim his materials as far as he can prove their identity;"

as stated in the syllabus to *Silsbury v. McCoon*, 3 N. Y. (Comstock) 379, 53 Am. Dec. 307, which is cited and quoted at length, in *Cobbey on Replevin* (2d ed.), § 909, as the leading case in this country on the subject. In that case the court, referring to the agreement of the common law with the civil law in certain respects, says further,

"They agree in another respect, to wit, that if the chattel wrongfully taken, afterwards come into the hands of an *innocent holder*, who, believing himself to be the owner, converts the chattel into a thing of different species so that its identity is destroyed, the original owner cannot reclaim it. Such a change is said to be wrought when wheat is made into bread, olives into oil, or grapes into wine. In a case of this

kind the change in the species of the chattel is not an intentional wrong to the original owner. It is therefore regarded as a destruction or consumption of the original materials, and the true owner is not permitted to trace their identity into the manufactured article, for the purpose of appropriating to his own use the labor and skill of the innocent occupant who wrought the change; but he is put to his action for damages as for a thing consumed."

See, also, Cobbey, Replevin (2d ed.), § 396; Wells, Replevin (2d ed.), § 216; Schouler, Personal Property (3d ed.), § 49.

This leads us to inquire concerning respondents' knowledge and good faith in acquiring the logs and sawing them into lumber and lath. We have seen that they had no knowledge whatever of any claim of appellant until January 18, 1907, some considerable time after the purchase of the logs and lumber from the Meyers Falls Lumber Company and the loss of the identity of all the logs by being commingled with a much larger mass of others, and the sawing of a considerable portion thereof into lumber. Counsel for appellant argue that the knowledge of Gray and his removal of the few remaining logs, already cut, from the land of appellant to respondents' log ricks, soon after the sale, while he was in their employ, must be imputed to respondents, and their good faith and honesty of purpose judged as though they actually knew these few logs were thus taken from appellant's land. The knowledge of Gray as to any of these logs coming from the land of appellant was acquired by him long before his employment by respondents and was not communicated to them, nor did they have any knowledge which would put them upon inquiry, or would raise the slightest suspicion that their employee was trespassing upon appellant's land. We think, under these circumstances, the rule that knowledge which an agent has acquired in business other than that of his principal cannot be imputed to the principal, should apply here. *Taylor v. Taylor* (Texas), 29 S. W. 1057; *Pringle v. Dunn*, 37 Wis. 449, 19 Am. Rep. 772; *Wheeler v. McGuire*, 86 Ala. 398, 5 South. 190, 2 L. R. A. 808; *Pepper & Co. v. George*,

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51 Ala. 190; *Pacific Mfg. Co. v. Brown*, 8 Wash. 347, 36 Pac. 273.

It is apparent from the authorities that the good faith and honesty of purpose with which the one acquiring the property and working the change therein has acted is the controlling influence in determining his title to the property in its changed form. We do not think one's good faith should be tested by any technical rule of imputed or constructive knowledge, when he has no actual knowledge and no knowledge which would put a reasonably prudent man on inquiry. A man's motives cannot be affected by a fact of which he has no actual knowledge, or no knowledge which would suggest inquiry relative thereto. We think the facts of this case show beyond controversy that respondents had no knowledge of any kind of the claim of appellant until long after the identity of all the logs had become lost.

So far, we have considered the question of respondents' good faith touching their acquiring of the logs and lumber, up until the 18th day of January, 1907, when appellant wrote to them that his logs had been taken by the Meyers Falls Lumber Company and that they were in some form among respondents' logs or lumber, but without any demand therefor. At this time, we are to remember, the identity of the logs had become entirely lost without any fault of respondents, a large part of the total mass, probably half or more, had been sawed into lumber, and a considerable part of that lumber shipped out to market, and it was impossible to tell what portion of the logs from appellant's land went into that lumber.

Nothing further was communicated by appellant to respondents until June 15, 1907, when he notified them of the quantity of lumber and lath the logs from his land would make, as he estimated; claiming the value thereof in its manufactured form to be \$3,398.33, and that, using his own words, "I shall expect a settlement of this account soon." At this time, according to his own statement, all of the timber

from his land had been sawed into lumber. Indeed, he delayed making this communication to respondents as to the quantity and value, which might well be argued to be a demand for the price of the lumber, without excuse, and for the evident purpose of waiting until he was sure the entire mass of logs in which the logs from his land had lost their identity had been sawed into lumber. This is evidenced by a letter he wrote to respondents three days later, in which he is careful to inform them, "The last of the timber from my land in this claim was sawed last week." At this time, it is further to be remembered, that according to the testimony of Bradrick, while a witness for appellant, they had been continuously shipping the lumber every month, even after the yards had been quite well cleaned of lumber in the spring. It is quite plain from the undisputed facts, not only that the logs from appellant's land had entirely lost their identity months before, and the entire mass into which they went had about this time been sawed into lumber of different kinds and values, but that a very large part of the entire mass had been shipped out to market and was not then in the possession of respondents. This shipping continued, which still further reduced the amount remaining in their possession, until after September 12, three months later, when appellant made his first and only demand for the property preliminary to the bringing of this action, which was still delayed until October 31, a month and a half later. In *Cobbey on Replevin* (2d ed.), § 395, it is stated:

"The tendency of the courts in applying the rule . . . has been to require of the plaintiff in such cases a reasonable diligence in asserting his rights, and where the defendant is not a willful wrongdoer, without the shadow of legal excuse, this should always be required of plaintiff." See, also, *Wells, Replevin* (2d ed.), § 217.

We believe appellant's delay in claiming the property, as shown by the undisputed facts, should have great weight in the determination of respondents' rights in this case. It is not pretended that the lumber from appellant's logs can be

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identified, nor even that his logs could be identified before being sawed into lumber. It is only a matter of surmise that any of the lumber claimed by appellant, and caused by him to be seized, was the physical product of logs from his land. The theory upon which learned counsel for appellant seem to base appellant's right to recover this lumber and lath is that they can take from the mass of lumber in respondents' yards a quantity equal to that which the logs from appellant's land would produce. We do not lose sight of the rule which enables one to recover his property from a common mass with which it has become commingled, when both are the same in kind and quality, and are so homogeneous both before and after commingling as to render actual physical identification of one part of the mass from the other, of no consequence, like corn, wheat, oil, etc. Such conditions apparently constitute an exception to the rule requiring actual physical identification of the property sought to be recovered by replevin, upon the theory that one part of the mass being alike in kind, quality and value, to all other parts thereof, it is of no consequence to the rights of the parties, what part each takes, beyond the mere question of quantity. This exception to the general rule requiring identification is recognized in the following authorities: Wells, Replevin (2d ed.), § 203; Cobbey, Replevin (2d ed.), §§ 401, 402; *Henderson v. Lauck*, 21 Pa. St. 359; *Inglebright v. Hammond*, 19 Ohio 387, 53 Am. Dec. 430; *Wilkinson, Carter & Co. v. Stewart*, 85 Pa. St. 255; *Eldred v. Oconto Co.*, 33 Wis. 188; *Ryder v. Hathaway*, 21 Pick. 298.

The exact limits of the application of this exception are not very clearly defined, some of the cases going so far as to allow the claimant to take his proper quantity from a mass of wood, or logs, but only where the kind and quality of each owner were alike. This is not a question of appellant's taking a quantity of logs from a common mass. Conceding that his logs were in kind and quality like the balance of the others (some two million feet) which they became commingled

with, he claims to have known the quantity he was entitled to in April, 1907, at which time there were still in the ricks of respondents, not yet sawed into lumber, a large quantity of this mass of logs, aggregating several times the quantity he claimed had been taken from his land. He not only did not demand or seek to recover from this mass, but he never did demand or seek to recover any logs, but waited, seeing it was being converted into lumber of varying kinds and values; and after feeling sure the physical material was all so changed into more valuable form, then for the first time, made a communication to respondents on June 15, which, if it can be construed as a demand for anything, was a demand for money, the first demand for the lumber being made three months later.

No authority has been called to our attention, and we think there is none, holding a claimant to have the right to take from a common mass with which his property has lost its identity without fault of the one from whom he claims, where the property has undergone such physical change as in this case; especially when he has stood by and watched the gradual conversion into something much more valuable, of varying kinds and values, without making claim or demand for his property in specie, until after such change has occurred, as this appellant has done. We think under the facts here admitted or conclusively shown touching the conduct of both the appellant and respondents, the former cannot lawfully recover the lumber and lath claimed by him.

This brings us to the question of whether or not the judgment of the lower court should be in all respects affirmed, or the cause remanded with instructions to grant a new trial, as contended for by learned counsel for appellant, in the event of our conclusion that appellant is not entitled to recover the property in specie, their contention being that the cause should be sent back for retrial as in the nature of an action for damages for wrongful conversion of personal property. This contention, it seems to us, is fully answered by the

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former holding of this court in the case of *Dow v. Dempsey*, 21 Wash. 86, 57 Pac. 355, where this court said, at page 95:

"The primary object of the action of claim and delivery, under the code, is to recover the possession of personal property in specie, and the gist of the action is the wrongful detention of the property by the defendant. In such an action it is necessary for the complainant, in order to state a cause of action, to allege that the property, recovery of which is sought, is wrongfully detained by the defendant (Bal. Code, §§ 5418, 5419). And a failure to prove the allegation must of necessity be a fatal variance. True, the action has as its secondary object the recovery of the value of the property in case delivery cannot be had, but the purpose of this is to prevent the action from becoming fruitless or ineffectual by reason of the property being lost, destroyed or disposed of by the holder, after action brought. It never becomes the primary object of the action, nor does it change the action into one for damages for the tortious taking and conversion of personal property."

This being purely an action in replevin to recover specific personal property, it seems plain that when the right to recover such property is determined adversely to the plaintiff, all other alternative or incidental relief which might be granted in that action must necessarily fail also.

We think that the learned trial court correctly disposed of the case, and that its judgment should therefore be affirmed. It is so ordered.

RUDKIN, C. J., MOUNT, CROW, and DUNBAR, JJ., concur.

[No. 7970. Department Two. September 25, 1909.]

ANTHONY WHITE, *Appellant*, v. SPOKANE & INLAND EMPIRE
RAILROAD COMPANY, *Respondent*, EDWIN H. SANDERSON
et al., *Defendants*.¹

MASTER AND SERVANT—SAFE PLACE—FALL OF ROCK IN QUARRY—
EVIDENCE—SUFFICIENCY. The owner of a quarry is not guilty of
negligence, rendering it liable to an employee who was injured by
the fall of rock from the side of a cliff, evidently jarred loose by a
blast at another place, where it appears that no work had been done
at that point for a month, that it had been reasonably inspected and
there was no appearance of danger from a fall of rock, and such
danger could only have been discovered by a very close inspection of
the wall (DUNBAR, J., dissenting).

Appeal from a judgment of the superior court for Spokane
county, Huneke, J., entered December 2, 1908, in favor of
the defendant, by direction of the court, upon withdrawing
the case from the jury, in an action for personal injuries sus-
tained by an employee in a stone quarry. Affirmed.

Poindexter & Moore, for appellant.

Graves, Kizer & Graves, for respondent.

PARKER, J.—In this action the plaintiff seeks to recover
damages on account of personal injuries which he alleged
were caused by the negligence of the defendant while working
in its stone quarry. The cause proceeded to trial before the
court and a jury, when, at the close of the evidence produced
by plaintiff, upon motion of defendant's attorneys, the court
discharged the jury from the consideration of the case and
entered judgment in defendant's favor as to the first cause
of action; from which order and judgment the plaintiff has
appealed to this court. The cause was continued for trial
upon the second cause of action by consent, so we are not
concerned with the issues there involved. The order and

¹Reported in 103 Pac. 1119.

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judgment of the superior court were rendered upon the ground that the evidence produced in behalf of plaintiff was not sufficient to warrant the submission to the jury of the question of negligence, and that the undisputed facts show that plaintiff's injuries resulted only from an accident for which the defendants were not responsible.

It appears from the evidence, all of which is brought here by a statement of facts, that appellant was employed by respondent as a foreman, and at the time of the accident causing his injuries he was overseeing the work of removing loose rock from the quarry. The quarry was located on the side of a steep hill, and by the excavation of the rock a level bench or floor had been created, open on one side, and with a perpendicular wall of rock some thirty-five feet high on the opposite side. Appellant's duties consisted only in overseeing and directing the loading of loose rock upon dump cars, after it had been blasted out and otherwise loosened by a gang of workmen under another foreman named Hoskins. Appellant had nothing to do with the blasting or breaking down of the rock. On September 27, 1907, while engaged in the quarry in discharge of his duties as foreman in directing the removal of the loose rock, the appellant sustained a broken leg and other injuries by a large fragment of rock falling from the face of the wall from a point about twenty-four feet above the floor of the quarry. The place from which it fell was difficult of access, and its loosened and dangerous condition was not observable from the floor of the quarry, where appellant and others were required to work. Appellant had never before known of rock falling from the face of the wall, and he had worked in and about the quarry about nine months. At the time this rock fell there was no apparent cause therefor, no blast had been set off, at or very near the place from which the rock fell, for about a month previous, though blasting had been going on in the quarry at other places frequently in the course of the work.

Hoskins, the foreman in charge of the blasting and break-

ing down of the rock, was a man of some twenty years' experience in work of that character. He testified in substance that, if rock did not fall at the time of a blast, it would not fall at all, though he gave it as his opinion that the last blast had jarred this rock loose. This last blast had been set off some time previous to the accident—just how long, was not very clear from the evidence—but appellant's attorneys in their brief placed the time at three-quarters of an hour before, which, in any event, is approximately correct. This blast was set off in the usual manner, and there was no evidence to indicate that it was different from or stronger than usual. It was set off at a point about twenty-four feet from the foot of the wall where the rock fell, and there was a seam separating the rock in which the blast was set off from the wall from which the rock fell. When a blast was about to be set off, of course, all the men left the quarry, and then after the discharge, it was Hoskins' duty to first go in and see that all was safe; when, upon an examination and being satisfied as to safety, he would call the men back to work, which was done upon this occasion in the usual manner. It was also Hoskins' duty to bar down loose rock, which he describes as follows:

"Mr. Poindexter: What do you call barring down, Mr. Hoskins? A. Taking down the loose rock, the rock that is not safe there. Q. How is that done there, what is it? A. Going in with a short bar or long bar, anything that a man can see, that is an experienced man, anything that he could see that would be liable to fall or jar down, why we barred it down, pull it down before it falls down. Q. Put a crow-bar in and pry it out and let it fall? A. Yes, sir."

He testified that upon this occasion he thought it was reasonably safe. He did not make a close inspection of the wall from which the rock fell after the last blast, and his prior inspections are shown by his testimony as follows:

"Q. Now then, you had previously blasted over at this point where this rock came down? A. Oh, perhaps a month before. Q. Exactly. And left it? A. Yes, sir. Q. And

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gone on with your blasting over there? A. Yes, sir. Q. And you and your men, and White and his men had been working in the quarry continually for something like a month? A. Yes, sir. Q. And you had examined that wall to see whether it was safe? A. Oh, I don't know as I would give it a very close examination. Q. Well, you gave it such an examination as was prompted by your instinct of your own safety? A. Yes, sir. Q. And the safety of the men entrusted to your care, hadn't you? A. Sure. Q. Sure? A. I was over it lots of times. Q. And you had pronounced it safe and gone on leaving it there? A. Yes, sir. Q. And it had held safe there for something like a month after the blast? A. Yes, sir."

As to the apparent safety of the wall, the appellant testified:

"Q. State whether or not you looked around to see if there were any loose rocks that might fall? A. Well, generally I looked, all that I could see around, of course protecting myself. Q. Did you look this morning? A. Yes, sir. Q. Did you see any rock that seemed to be about to fall? A. No, sir."

Hoskins also testifies as to its apparent safety as follows:

"Q. Was there anything peculiar to you about this rock as you saw it there? A. Not to the naked eye. Q. Well, in any way that you were able to observe it? A. No, sir. Q. Now, did it look any different from any other of the rocks that were seamed and cracked as shown by the photograph about the place? A. No, sir."

And as to how the possibility of this rock falling could have been discovered, is shown by Hoskins' testimony as follows:

"Mr. Poindexter: State whether or not by a careful inspection it could have been discovered that this rock was loose and about to fall or might fall. A. It could by a very careful inspection be seen that that rock was loose. Q. In what way would such an inspection be made? A. By sounding. Q. What? A. Sounding, with a bar. Q. What do you mean by sounding with a bar? A. By hitting with a bar you can tell whether a rock is loose or solid, unless it is too large, by touching with a bar or taking the hammer, it has got a hollow

sound to it. Q. What you mean to say is, to discover whether that rock is loose or any other rocks were loose, somebody would have to go along the whole face of that cliff from top to bottom and thump it with a bar? A. Yes, but you don't have to go that close, just throw that bar against the wall anywhere. Q. Exactly; I don't care how close you go, but anywhere. What you mean though, is whether you go close or stand far off you take the bar and go along up or along the different places of that cliff. A. Yes, sir. Q. That is what you call a very careful examination? A. That is what I call a very careful examination."

The principal contention of learned counsel for appellant is that, had the foreman Hoskins, to whom that duty had been delegated, made a proper inspection, the unsafe condition of the place would have been discovered and the danger obviated, and that respondent, not having performed his duty through Hoskins in this respect, did not furnish appellant a reasonably safe place in which to work. So the question is presented, what was respondent required to do more than was done by Hoskins, its foreman, in the way of inspection of the wall and the place from which the rock fell and injured appellant.

In Webb's Pollock on Torts (Enlarged American Edition), on page 42, the learned author says:

"The doctrine of 'natural and probable consequence' is most clearly illustrated, however, in the law of negligence. For there the substance of the wrong itself is failure to act with due foresight; it has been defined as 'the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do'. Now a reasonable man can be guided only by a reasonable estimate of probabilities. If men went about to guard themselves against every risk to themselves or others which might by ingenious conjecture be conceived as possible, human affairs could not be carried on at all. The reasonable man, then, to whose ideal behavior we are to look as the standard of duty, will neither neglect what he can forecast as probable, nor waste his anxiety on

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events that are barely possible. He will order his precaution by the measure of what appears likely in the known course of things. This being the standard, it follows that if in a particular case (not being within certain special and more stringent rules) the harm complained of is not such as a reasonable man in the defendant's place should have foreseen as likely to happen, there is no wrong and no liability."

In the recent case of *Southwestern Telegraph & Telephone Co. v. Tucker* (Tex.), 114 S. W. 790, we find a situation much like the one before us, involving the same principle so far as the duty of inspection or liability for unknown defects or dangers are concerned. In that case the plaintiff was sent to the top of a telephone pole when the pole fell injuring him, the fall being caused by its decayed condition under the surface of the ground, while above ground it appeared to be sound. Touching the defendant's duty as to inspection the court said:

"If there was any negligence on the part of the plaintiff in error in not having inspected the pole sufficiently to have discovered the defects, or if there had been anything to indicate that the pole was rotten under the ground, it would clearly have been the duty of the company, through its inspector, to have examined the pole, which would have resulted in the discovery of the defect. The evidence discloses, so far as was known, that there was no reason to suppose that the pole was rotten, for according to the testimony the pole had been standing only for six years. The rottenness of the pole having been concealed by the ground, we fail to see that there was anything in the testimony tending to show that the plaintiff in error ought to have discovered it. We know of no rule of law that imposes upon the master the duty of looking out for defects in objects with which the servants are working, where there is nothing to indicate that any such defect existed. To so hold would be to make the master the insurer of the safety of the servants absolutely. As we have said, poles of the same character usually last unimpaired for a period of 12 years. To all appearances it was entirely sound, and we cannot see that there was anything to indicate that it required any more inspection than was given to it by the injured party. The case narrows itself down to the question,

What would a man of ordinary prudence have done under the circumstances? There being nothing in regard to the pole to excite any suspicion as to its soundness, or anything to indicate that a further inspection was necessary in order to test its sufficiency, we do not see how it can be said that an ordinary prudent man would have taken any other steps in regard to it."

In the case of *Cully v. Northern Pac. R. Co.*, 35 Wash. 241, 77 Pac. 202, a nonsuit was sustained by this court where plaintiff was injured by a slide from the side of a gravel pit in which he was working, and which occurred in a similar unexpected manner as the falling of the rock in this case. Disposing of the plaintiff's contentions seeking to invoke the rule of reasonably safe place to work, this court, at page 247, said:

"Granting a nonsuit is the next error assigned. The appellant seeks to invoke the rule in this case that it is the duty of the master to furnish the servant with a safe place in which to work. This rule, however, has no application to this class of employment. As was said in *Kath v. Wisconsin Cent. R. Co.* (Wis.), 99 N. W., at page 221: 'The place to work is being changed constantly, and is necessarily incomplete and dangerous; and the employe knows it, and accepts such risks as are ordinarily present in such operations.'"

Now if the rule of reasonably safe place to work should be considered applicable here, the degree of care to be exercised by the master is, after all, only *reasonable care* and the furnishing of a *reasonably safe place* to work. The undisputed evidence makes it clear that there was no reason to suppose that any rock on the face of the wall was in such condition as to be at all likely to fall at such a time as it did fall. Both the appellant and Hoskins, his principal witness, saw no such indication. It had stood there for a month with blasting going on frequently in the quarry, and during all of this time it had remained apparently safe. And as to the care with which it was inspected, Hoskins says: "I was over it lots of times." And it is clear from his testimony that at the time of

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the accident the dangerous condition could only have been discovered by a very careful inspection. It is clear that there was no apparent reason for making a very careful inspection.

In the case of *Wilson v. Northern Pac. R. Co.*, 31 Wash. 67, 74, 71 Pac. 713, referring to unknown and unsuspected dangers, the court used this language:

"When the danger is not known, and not suspected, and where there are no circumstances which would cause a reasonably careful man to investigate and ascertain the danger, the law will not impute knowledge of danger where the knowledge is not shown in fact."

We are of the opinion that the undisputed evidence in this record shows that there was no negligence such as in law would render the respondent liable in damages for appellant's injuries. We therefore conclude that the disposition of the cause by the trial court was proper, and its judgment is affirmed.

MOUNT and CROW, JJ., concur.

DUNBAR, J. (dissenting).—I dissent. It is conceded that the duty of inspection devolved upon Hoskins, the foreman in charge of the blasting and breaking down of the rock. The appellant necessarily could not be charged with such duty under the rule that, in the absence of apparent danger, he had a right to rely upon the master to furnish him a safe place to work. In this case I am convinced that Hoskins relied upon the fact that there was no apparent danger; but the master's duty does not end here, else he would be placed on the same footing with the servant. The testimony of the respondent reveals the fact that, if Hoskins had made the inspection which he should have made, and which he testified it was easy to make, the hidden danger would have become apparent. The fall of the rock was not the result of an accident; it was concededly the result of a blast; and if the inspection had been commensurate with the danger necessarily in-

cident to such work, the condition would have been discovered and the injury averted. In any event, the question of the sufficiency of the evidence was a question for the determination of the jury. I do not think the cases cited from this jurisdiction are controlling.

[No. 7975. Department Two. September 25, 1909.]

MAGGIE GRANT, *Appellant*, v. OREGON RAILROAD &
NAVIGATION COMPANY, *Respondent*.¹

RAILROADS — CROSSINGS — NEGLIGENCE — WARNING — EVIDENCE — SUFFICIENCY. The evidence is sufficient to show negligence upon the part of a railroad company in switching cars at a public crossing where people were in the habit of crossing, when no warning was given by bell, whistle, or lookout on the freight car backed upon the crossing.

SAME — CONTRIBUTORY NEGLIGENCE — FAILURE TO LOOK AND LISTEN — ACTS IN EMERGENCY. One run down at a railroad crossing is not guilty of contributory negligence as a matter of law, in going upon the track without stopping to look or listen, where she had just alighted from a buggy, her attention was diverted by the fright of the horses, and she involuntarily backed onto the track in an endeavor to get out of the way of the team.

SAME — QUESTION FOR JURY. A woman is not guilty of contributory negligence, as a matter of law, in alighting from a buggy within six to ten feet from a railroad crossing in a place of safety, but so close that she was crowded onto the track by the fright of the horses, where there was no indication of an approaching train likely to frighten the horses, which were used to trains and ordinarily gentle.

EVIDENCE — DECLARATION — RES GESTÆ. In an action for personal injuries sustained at a railroad crossing, the rejection of evidence of declarations of the train crew, offered as part of the *res gestæ*, is discretionary.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered September 18, 1908, in favor of the defendant, by direction of the court, upon withdrawing the case from the jury, after a trial on the merits,

¹Reported in 103 Pac. 1126.

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in an action for personal injuries sustained by a pedestrian at a railroad crossing. Reversed.

Gray & Knight and *Alex M. Winston*, for appellant.

W. W. Cotton, *Arthur C. Spencer*, *Samuel R. Stern*, and *Ralph E. Moody*, for respondent.

PARKER, J.—By this action plaintiff seeks to recover damages for personal injuries caused by being run over by a car of defendant, at a public crossing adjacent to and immediately west of its passenger depot, at Harrison, Idaho, on June 17, 1907. The negligence charged against the defendant in the complaint is, in substance, that several cars were being pushed by an engine of defendant rapidly over its track near and upon the crossing; that no bell was rung on the engine, no whistle blown, and no notice or signal of any kind given of the approach of the train before coming to the crossing; that no proper lookout was kept in front of the train, no brakeman or other employee being on the front car, or stationed at the crossing to keep a lookout or give signals of warning; and that the employees upon the train were in the rear thereof and upon the engine. The defendant by its answer denies the material allegations of the complaint, and affirmatively alleges that the injuries of defendant were received by her own want of care, and by reason of her contributory negligence, which affirmative allegations were denied by plaintiff's reply. Upon a trial before the court and a jury, at the conclusion of the plaintiff's evidence, defendant's attorneys challenged the sufficiency of the evidence to show liability on the part of the defendant, moved the court to withdraw the case from the consideration of the jury, and render judgment for defendant dismissing the cause, upon the grounds that the evidence failed to show that the defendant was negligent in any manner or respect, and also that the evidence conclusively showed that the injuries to the appellant were caused by her own fault and want of care, and that the proximate cause of the injuries was her own contributory neg-

ligence. The court granted the motion and rendered judgment accordingly. Thereafter, upon the denial of the plaintiff's motion for a new trial, she appealed to this court, where the principal contention of her attorneys is that the learned trial court erred in thus disposing of the case.

From the record it appears that a public road leads down and along the side of a steep hill from the business portion of Harrison to the depot and crossing where the accident occurred. This public way not only leads to the depot, but also to a steamboat landing but a short distance across the track and beyond the depot, crossing the railroad track near the end of the depot. At the end of the depot, the ground has been leveled from the track close into the hillside, so as to enable teams and vehicles to turn there. On the day of the accident, the appellant with her grandchild was being taken down this road by a Mr. Wheeler in a buggy, with a view to taking the boat at the landing just across the track beyond the depot. While coming down the hill, appellant saw an engine standing on the track in the yard not far from the depot, some distance from the crossing, but did not afterwards notice or pay any attention to it. On arriving at the crossing, Mr. Wheeler stopped his buggy parallel with, and from six to ten feet from, the track, turning his horses' heads toward the hill and away from the track to enable appellant and the child to alight and to go to the boat across the track, intending to turn his team in the level space there and return up the hill without crossing the track. He then got out holding the lines in one hand, assisted the appellant and child to alight, reached in the vehicle for appellant's traveling bag and handed it to her, when there came a very loud exhaust of steam from the engine, or as Wheeler describes it, "four or five or six explosions or exhausts or coughs," causing the horses to become immediately much frightened. Using Wheeler's words,

"And the horses jumped, the off horse or the horse that was next the railroad track crouched down, and the other

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horse plunged ahead, and that threw the horses towards the railroad track, cramping the buggy the other way, towards the railroad track, and as they plunged forward, I grabbed the lines in my other hand, in both hands, and surged back on them, and then they backed up probably six feet, and then I straightened them out, of course they were plunging as soon as the exhaust was coming from the engine."

The appellant and child being between the buggy and the track, she grabbed the child by the hand and backed away from the buggy and frightened horses upon the crossing of the railroad, and was there run over by the first car of a short train, which was being pushed by an engine of respondent towards and upon the crossing. The cars were apparently being moved in switching operations. The first car was a flat car and the second a coal car with box cars following. It is apparent that the train ran something more than the length of the car after she was struck before being stopped, as she was taken from under the second truck of the first car, and had been dragged a short distance. No brakeman or any one was upon the first or second car to keep a lookout ahead, no bell was rung or whistle blown from the engine, no flagman was upon the crossing, and no employee upon the train was nearer than the top of the third car from the end of the train approaching the crossing. One witness said the train was going about as fast as a man could run, another witness said it was going about three times as fast as a man could walk.

Appellant testified she did not hear the train or the exhaust. She says: "I don't know what excited them [horses]; I was not thinking anything about it; I was thinking of getting away from the horses and getting the little girl away." Wheeler says the horses were accustomed to cars, and showed no indication of being frightened when he stopped; that he saw the train, but not until the exhaust from the engine; then looked up, and saw it coming, the first car being probably sixty feet from him. Like other witnesses he heard no bell or whistle. He did not see the acci-

dent to appellant, his attention being diverted to his team until they were gotten under control soon thereafter. It was conceded that from the crossing one could see a train in the direction from which this one came a distance of 400 feet. There is substantial agreement among the four eye-witnesses as to the main facts.

Appellant's assignments of error present two principal questions. Was the evidence at the close of appellant's case such that the court could decide, as a matter of law, (1) whether or not respondent's negligence was a proximate cause of the injury; and (2) whether or not appellant's negligence contributed to her injury to the extent that respondent was relieved of liability therefor? We will notice these in their order.

Viewing the evidence as it relates to the question of the respondent's negligence, independently of any contributory negligence on the part of appellant, it seems to us it was beyond question sufficient for the jury's consideration. The train was backed towards and upon this public crossing where many people were in the habit of passing, no bell was rung, no whistle was blown, no employee was on the first or even second car, nor at the crossing to give warning of the approaching train. According to this evidence, respondent was negligent in not exercising even the least of ordinary care. Indeed, it entirely failed in that regard, and pushed these cars upon this public crossing as though it were not there, without giving any warning whatever such as is usually given at such places. There was abundant evidence, if believed by the jury, to support a finding of negligence against the respondent. 3 Elliott, Railroads, §§ 1156, 1158; Beach, Contributory Negligence (3d ed.), § 194; *Cooper v. Lake Shore & M. S. R. Co.*, 66 Mich. 261, 33 N. W. 306, 11 Am. St. 482; *Duane v. Chicago & N. W. R. Co.*, 72 Wis. 523, 40 N. W. 394, 7 Am. St. 879; *Fisher v. Monongahela R. Co.*, 131 Pa. St. 292, 18 Atl. 1016; *Cleveland etc. R. Co. v. Carey*, 33 Ind. App. 275, 71 N. E. 244; *Atchison etc. R. Co. v.*

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Wilkie, 77 Kan. 791, 90 Pac. 775, 11 L. R. A. (N. S.) 963; *Williams v. Chicago etc. R. Co.*, 78 Neb. 695, 111 N. W. 596, 14 L. R. A. (N. S.) 1224; *Roth v. Union Depot Co.*, 13 Wash. 525, 43 Pac. 641, 31 L. R. A. 855. And unless it can be determined, as a matter of law, from the evidence that appellant was guilty of such contributory negligence as relieved respondent of liability, it was error to take the case from the jury.

Upon the question of appellant's contributory negligence, we are at the outset met with the contention of learned counsel for respondent that the failure of appellant to stop, look and listen for the approach of a train at this crossing makes her guilty of negligence *per se*, under the previous decisions of this court, citing in support of this contention: *Woolf v. Washington R. & Nav. Co.*, 37 Wash. 491, 79 Pac. 997; *Baker v. Tacoma & Eastern R. Co.*, 44 Wash. 575, 87 Pac. 826; *Anson v. Northern Pac. R. Co.*, 45 Wash. 92, 88 Pac. 1058; *Gregg v. Northern Pac. R. Co.*, 49 Wash. 183, 94 Pac. 911; *Cable v. Spokane & Inland Empire R. Co.*, 50 Wash. 619, 97 Pac. 744. In all of these cases, however, the injured party knowingly and voluntarily went upon the track without obeying the well-established general rule here invoked by counsel. None of them were impelled to go upon the track other than by their own free will; and this we think clearly distinguishes the facts in those cases from the position of this appellant and the cause which impelled her to back away from the buggy and frightened team upon the crossing where she was run down by respondent's train. The rule is not without its qualifications. One may be under the influence of such real or apparent danger, from a source other than the crossing and approaching trains, as to cause him to involuntarily go upon the crossing in an attempt to escape such danger, which for the moment may be absorbing his entire attention, and thus be exonerated from the imputation of negligence in failing to stop, look and listen. Nor need the diverting influence necessarily be a danger from

which escape is sought. In a case where there is evidence to show such a situation and diverting influences that reasonable men might reach different conclusions as to whether or not the person so involved acted as a reasonably and prudent person would act under the circumstances, the question of negligence of such person in failing to stop, look and listen, becomes one of fact for the jury.

In the case of *Lorenz v. Burlington C. & N. R. Co.*, 115 Iowa 377, 88 N. W. 835, 56 L. R. A. 752, the deceased was struck by a train at a crossing and killed while attempting to head off and drive back a cow which had escaped from his control, his attention being thus diverted for the moment from the dangers of the crossing. Justice McClain, speaking for the court, presents such a clear statement of what we conceive to be the true rule and its application, that we quote from his language at some length:

"It is further contended that the court erred in instructing the jury in such a way as to allow them to determine whether the facts and circumstances surrounding the accident were of such a dangerous, complicated, and confusing character as would be calculated to cause a person of ordinary prudence and caution, under the same conditions, to forget for the instant his dangerous position. It is to be borne in mind that one who is guilty of contributory negligence in connection with his injury is precluded from recovering for such injury, not because of a direct breach of duty towards the person whose negligence has primarily caused the injury, but because he cannot recover for an injury to which his own fault has in any way contributed. The negligence of the one party and the contributory negligence of the other are wholly distinct and independent considerations, and the contributory negligence of the person injured may preclude recovery by him, although it had no influence or effect whatever on the party causing the injury, or, for that matter, was entirely unknown to him. Therefore, in determining what constitutes contributory negligence, we are not to consider what care the person causing the injury had reason to suppose the other person would use, but only whether the person injured did use the care which the circumstances required of him. Now,

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while the rule is well settled in this state, and generally elsewhere, that it is contributory negligence for a person to go upon a railway track without looking or listening to ascertain whether there is danger from an approaching train, yet his duty in that respect is to exercise the care which reasonably prudent persons would exercise under such circumstances. The duty to look and listen is not an absolute one, but one the exercise of which is dependent on conditions. Certainly a person who should rush to rescue a child from danger on a highway, due to an approaching runaway team, might be excused for not stopping to look and listen for a possible train on a railway track which he must cross in order to reach the child. The qualification of the rule, which justifies the taking into account of the surrounding circumstances in determining whether there was negligence in failing to look and listen, is well established. *Howland v. Union Street R. Co.*, 150 Mass. 86, 22 N. E. 434; *Wasmer v. Delaware, L. & W. R. Co.*, 80 N. Y. 212, 36 Am. Rep. 608; *Thompson v. New York C. & H. R. R. Co.*, 110 N. Y. 636, 17 N. E. 690; *Kane v. Northern C. R. Co.*, 128 U. S. 91, 9 Sup. Ct. Rep. 16, 32 L. Ed. 339. And this qualification has been recognized by this court. *Funston v. Chicago, R. I. & P. R. Co.*, 61 Iowa 452, 16 N. W. 518; *Lichtenberger v. Meriden*, 91 Iowa 45, 58 N. W. 1058. The question whether, then, in view of the purpose with which deceased went upon the track, and the circumstances under which he did so, he was exercising the reasonable care which an ordinarily prudent man would exercise under the circumstances, was for the jury."

Following the view of the Iowa court as expressed in this opinion, the supreme court of Idaho has recently decided the case of *Wheeler v. Oregon R. & Nav. Co.* (Idaho), 102 Pac. 347, which involved the death of this child by this same accident, in which case the contributory negligence of this same appellant was relied upon as a defense, the child being then in her charge. The facts of that case, as related in the opinion, show that the proof was substantially the same as here, and it was held that the question of appellant's contributory negligence was one of fact, and rightly submitted to the jury. *Shearman & Redfield, Negligence* (5th ed.), § 89; *Chattanooga Elec. R. Co. v. Cooper*, 109 Tenn. 308,

70 S. W. 72; *International & G. N. R. Co. v. Neff*, 87 Tex. 303, 28 S. W. 283; *Alabama & V. R. Co. v. Lowe*, 73 Miss. 203, 19 South. 96; *Nebraska Telephone Co. v. Jones*, 60 Neb. 396, 83 N. W. 197.

Learned counsel for respondent contends that the situation in which the appellant was placed did not relieve her from exercising the care required by the rule invoked. That is, her position was not fraught with such peril as relieved her from the duty to stop, look and listen before approaching the crossing. We cannot so determine, as a matter of law, in view of the surroundings shown by the evidence in this case. She was between the track at her back and the buggy and frightened horses in front, with her attention directed upon the team, and according to her own testimony, not knowing even what excited them, was not thinking of it, but was thinking of getting away from the horses and getting the little girl away. Her failure to notice the loud exhaust from the engine so plainly heard by the others, might well be attributed to the fright of the horses attracting her attention which occurred practically at the same instant. Whether or not she acted at that moment as a reasonable person under the circumstances, as they appeared to her, was, it seems to us, a question of fact for the jury.

It is also argued that, since this situation in which appellant was placed was not caused by the act or negligence of respondent, she was not relieved from the duty of exercising the same degree of care in going upon the crossing as though there was nothing there to divert her attention. The only case cited by counsel or called to our notice in support of this contention is that of *Trowbridge's Adm'r v. Danville Street-Car Co.* (Va.), 19 S. E. 780. While that decision, and possibly others, may lend support to counsels' position, we think the weight of authority, as well as the sounder reason, is to the contrary, as shown by the foregoing citations. The following from the supreme court of Tennessee, in *Chatta-*

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nooga Elec. R. Co. v. Cooper, supra, at page 312, is especially in point:

"But it is a mistake to assume, as is done by the plaintiff in error, that the application of this rule is restricted to cases where the peril producing the confusion of judgment, and the consequent false effort to escape, is the negligent act of the party creating the peril. Judge Elliott, in section 1173, vol. 3, of his work on Railroads, says: 'The rule goes further than to exonerate the traveler where the peril is caused by the railroad company; for if, without fault himself, the traveler is placed in a position of sudden peril by a third person, or by some accident—as, for instance, by horses running away—he may be absolved from exercising that degree of care required of one in ordinary circumstances.'"

We think the reasonableness of the appellant's action is to be determined without regard to whether the cause which diverted her attention from the dangers of the crossing, was produced by the respondent or by some other entirely independent agency.

It is further contended that the situation in which the appellant found herself immediately preceding the accident was brought about through her own negligence and want of care in consenting to Mr. Wheeler driving so near the track and crossing, and her voluntarily alighting there. The evidence shows that the team was gentle and used to the cars; that there was no indication of fright of the team until the instant of the loud exhaust of the engine; that the buggy was stopped parallel with, and from six to ten feet from, the track, witnesses differing to that extent in estimating the distance; that the team was turned away from the track; that at the time they stopped there was no indication of any approaching train so far as noise or signals were concerned; that neither appellant nor Wheeler noticed any approaching train; and that the location was a public crossing used frequently by a great many people. It does not appear just how close to the track and crossing appellant was standing when she commenced to back away from the buggy and

frightened horses, but a jury might reasonably infer from the evidence that she was then in a place of perfect safety so far as the dangers of the crossing alone were concerned, even if a train were approaching; and that she would have remained uninjured but for her movements caused by the frightened team. It might be plausibly argued that, when they drove up to the crossing, stopped from six to ten feet therefrom with the horses turned away from the track, there was then no occasion to stop, look and listen, since they were not then in the act of going upon the track. Appellant had not started to go upon the crossing until thereafter, when she did so involuntarily, and Wheeler had no intention of going upon the crossing at all. We cannot say, as a matter of law, that she was negligent in consenting to be driven to and alighting there. The question of her negligence in placing herself in this position, as well as in backing upon the crossing away from the buggy and frightened horses without stopping, looking and listening, is, in its last analysis, one purely of fact to be submitted to the jury under proper instructions.

The rejection by the court of certain declarations of members of the train crew, made soon after the accident and offered to be proven by appellant's counsel as part of the *res gestae*, we think was not error. Their rejection was an exercise of the court's discretion, which was apparently not abused.

We are of the opinion that the learned trial court committed error in taking the case from the jury, and thus determining the question of negligence as a matter of law. The judgment is reversed with instructions to grant appellant a new trial.

RUDKIN, C. J., MOUNT, DUNBAR, and CROW, JJ., concur.

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Syllabus.

[No. 7901. Department One. September 25, 1909.]

VICTOR W. S. DENNY, *Respondent*, v. SIGMUND
SCHWABACHER, *Appellant*.¹

HUSBAND AND WIFE—COMMUNITY PROPERTY—PRESUMPTION—DEGREE OF EVIDENCE. The presumption that property acquired by purchase by the wife during marriage is community property can only be overcome by clear and satisfactory evidence.

TRUSTS—GIFTS—HUSBAND AND WIFE—PRESUMPTIONS—EVIDENCE. The presumption that property paid for from a wife's separate estate and deeded to the husband is a gift, can only be overcome by clear, cogent and convincing evidence establishing the trust relation.

HUSBAND AND WIFE—COMMUNITY PROPERTY—TRUSTS—GIFTS—PRESUMPTION—EVIDENCE TO OVERCOME. Real estate, conveyed to the husband, is sufficiently shown to be the separate property of the wife and held in trust for her, so that it would not be subject to a subsequent judgment recovered against the husband, where it appears that, at the time the property was purchased, the wife was possessed of separate real and personal property of considerable value, that she paid for the property by giving her personal check and satisfying a loan she had made derived from her separate estate, and from the same source paid for improvements on the property, and the husband admitted the trusteeship, no credit was given him by virtue of his holding the title, and the property was conveyed before execution sale.

WITNESSES—TRANSACTION WITH PERSON SINCE DECEASED—INTEREST OF WIFE. A wife is competent to testify as to the trust relation that had existed between herself and her deceased husband, as to property since conveyed by her, where she files a disclaimer of any interest, notwithstanding the allegation of the objecting party that she was interested in the property.

QUIETING TITLE—LIMITATION OF ACTIONS—EXECUTION SALE—TITLE HELD IN TRUST. An action to quiet title against an execution sale, under a revived judgment recovered twelve years previously against the holder of the record title, is not barred by the statute of limitations, where it appears that the judgment debtor held the title only as a trustee for another, and acknowledged and executed the trust three years prior to execution sale, and that the plaintiff had been in possession ever since the execution of the trust and commenced action the year after the execution sale.

¹Reported in 104 Pac. 137.

Appeal from a judgment of the superior court for King county, Morris, J., entered October 10, 1908, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to quiet title. Affirmed.

Harold Preston and G. Ward Kemp, for appellant.

William Martin and John B. Denny, for respondent.

GOSE, J.—This action, instituted by the respondent July 1, 1907, to obtain a decree declaring him to be the owner in fee of the property in controversy and to quiet his title, terminated in a decree in his favor on October 10, 1908, from which this appeal is prosecuted. The complaint alleged, that the respondent was, and since July 16, 1903, had been, the owner and in the possession of the property; that the appellant Schwabacher claimed an interest therein adverse to the respondent, under an execution sale upon a judgment against D. T. Denny and D. Thomas Denny; that neither of the judgment defendants at any time owned any interest in the property, but that the same became the separate property of Louisa Denny, wife of D. T. Denny, on October 5, 1889, in virtue of a purchase of the same by her and a conveyance of the legal title to her husband D. T. Denny, who held the legal title for her until July 16, 1903, at which date they conveyed it to the respondent.

The answer denied the respondent's ownership, and alleged affirmatively that the property was acquired as the community property of D. T. Denny and his wife, Louisa Denny; that the appellant Schwabacher acquired title as a purchaser at an execution sale upon a judgment in his favor against D. T. Denny and D. Thomas Denny, theretofore entered upon a community indebtedness of D. T. Denny and his wife, Louisa Denny; that the respondent's right to maintain the action was barred by the statute of limitations and by his laches. Louisa Denny was made a cross-defendant, under an allegation in the answer and cross-complaint that she claimed an interest in the property. The reply joined issue

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on the new matter in the answer. Louisa Denny before the trial answered, disclaiming any interest in the property, and alleging that on the 16th day of July, 1903, she conveyed the same to the respondent by a deed of gift. Upon the issues thus joined, the case was tried to the court.

It is admitted that D. T. Denny and Louisa Denny were husband and wife on October 5, 1889, and that on that date the property was conveyed to D. T. Denny, and that the legal title remained in his name of record until July 16, 1903, when it was conveyed to the respondent by D. T. Denny and his wife Louisa, by a deed which was filed for record on November 20 following.

The principal question to be determined is, whether the property was purchased with the separate funds of Louisa Denny and conveyed to D. T. Denny in trust for her. If it was so purchased and conveyed, respondent's title is complete, unless a determination in his favor is precluded by the statute of limitations or his laches. If it was not so purchased and conveyed, the appellant Schwabacher acquired title as the purchaser at the execution sale. A brief review of the evidence, therefore, becomes incumbent in order to determine this question.

The evidence shows conclusively, that D. T. Denny died November 25, 1903; that in 1896 the appellant Schwabacher recovered a judgment against D. T. Denny and D. Thomas Denny, which was renewed in 1902; that in 1906 all the right, title and interest in the property, owned by D. T. Denny on May 8, 1902, was purchased by the appellant Schwabacher at a sale made upon an execution issued upon the judgment; that the sale was confirmed; that D. T. Denny and Louisa Denny, in consideration of love and affection, conveyed whatever interest they had in the property to the respondent, their son, on July 16, 1903, and that he has since been in possession thereof; that the deed of conveyance was filed for record on November 20 following; that before the execution sale, the respondent caused a notice to be served on the attorneys for the

appellant Schwabacher, and upon the sheriff, notifying them that D. T. Denny owned no interest in the property, and that he caused public notice to that effect to be given at the sale.

There are two applicable fundamental principles of law in the instant case: (1) Property acquired by purchase during marriage is presumed to be community property, and the burden rests upon the spouse asserting its separate character to establish his or her claim by clear and satisfactory evidence. *Ballard v. Slyfield*, 47 Wash. 174, 91 Pac. 642. (2) Where the consideration for a conveyance of property is paid from the separate funds of one spouse and the property is conveyed to the other, a presumption of a gift rather than a trust arises, and this presumption can only be overthrown and the trust relation established by evidence that is clear, cogent, and convincing. Pomeroy, Eq. Jur., § 1041.

Applying these rules to the evidence, we have no difficulty in reaching the conclusion that the property was purchased at the instance of Louisa Denny, paid for by her from the proceeds of her separate property, and conveyed to D. T. Denny in trust for her. The evidence shows that, in 1866, a patent was issued by the United States, conveying to D. T. Denny the east half, and to Louisa Denny the west half, of a three hundred and twenty-acre donation claim; that at the time of the purchase of the property in controversy, the land of the latter had become valuable, and that she had separate property of great value; that she wanted the property involved in this suit for a family burial ground; that one of her daughters had recently died; that she purchased the property from her son-in-law and daughter, and paid them therefor the sum of \$800, \$600 of which was paid by her personal check, and \$300 was paid by her satisfying a loan of that amount which she had made the grantors a few months before. This money was derived from the sale of a part of her donation claim, which was admittedly her separate property. The evidence further shows that she paid for certain work done in clearing a part of the property, from her separate money;

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and that D. T. Denny, prior to his death, stated to his son and a daughter that their mother owned the property; that prior to the purchase of the property, he stated to his son-in-law, the then owner of the property, that his wife wanted to purchase it.

The appellant argues that, eighteen years having elapsed between the date of the purchase and the trial, the memory of interested witnesses as to the nature of the transaction should not be permitted to overthrow the presumption arising from the deed, and that the evidence of the witnesses, near relations of the respondent, bears the earmarks of consultation, preparation, and even collusion. Answering the first proposition, it is true that such evidence will be carefully scrutinized, and it is also true that ordinarily statements and conversations, resting in memory only, as to ancient transactions are not of great probative force. But in the instant case, it is clear that the mother's desire to procure the property in controversy as a place for the interment of the remains of the members of her family was so great as to fix the transaction indelibly in her memory. It appears from the evidence that the children had for years used this property as a resort for camping and frequent daily outings, that they had become much attached to it, and that from these associations there arose in her a fixed purpose to procure the property and devote it to the use stated. As to the question of preparation, consultation, and collusion, a careful reading of the evidence has convinced us of the candor, veracity, and credibility of the several witnesses.

It is further argued that certain exhibits in the record disclose that it was the habit of Louisa Denny to keep her separate property in her own name, and convey it without her husband joining. We have examined the exhibits in connection with the other evidence, but do not regard the inference to be drawn therefrom of sufficient strength to qualify the view we have expressed. A more extensive review of the evidence would serve no useful purpose.

The appellant urges that Louisa Denny was disqualified from testifying, under the provisions of our code, Bal. Code, § 5991 (P. C. § 937). When she filed her disclaimer she was no longer a party to the action. The appellant could not, against her sworn disclaimer, disqualify her by an averment in the cross-complaint that she claimed an interest in the property. *Sackman v. Thomas*, 24 Wash. 660, 64 Pac. 819.

It is finally contended that the respondent's cause of action is barred by the statute of limitations and by his laches. The authorities cited do not, in our opinion, even tend to support either view. We have seen, that the property was conveyed to the respondent before the execution sale; that the trustee acknowledged and executed the trust before his death, and that the respondent, since he acquired title, has been in possession of the property. There is no evidence that any credit was given to D. T. Denny relying upon his supposed ownership of the property, nor is there any evidence that the latter ever asserted title; but upon the contrary, as we have seen, he admitted his trusteeship. The indebtedness upon which the judgment was entered arose in March, 1893, at which time D. T. Denny was reputed a wealthy man.

From what we have said, it follows that the decree should be affirmed, and it is so ordered.

RUDKIN, C. J., FULLERTON, and CHADWICK, JJ., concur.
MORRIS, J., took no part.

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[No. 7775. Department One. July 10, 1909.]

C. G. STIMSON, *Respondent*, v. DAVID SWANK, *Appellant*.¹

Appeal from a judgment of the superior court for King county, Albertson, J., entered July 28, 1908, upon findings in favor of the plaintiff, after a trial before the court without a jury, in an action on contract. Affirmed.

Walter S. Fulton, for appellant.

William C. Keith, for respondent.

MORRIS, J.—In this action respondent sought to recover \$428.60 on account of services performed. Liability was denied, and a counterclaim for \$407.14 pleaded in the answer, which was denied in the reply. Trial was had before the court without a jury, and judgment rendered in favor of respondent for \$285.42.

Upon this appeal the only error assigned is insufficiency of the evidence to sustain the judgment. A reading of the evidence convinces us that the court was justified in reaching its conclusion as to the proper statement of the account between the parties, and the judgment is correct. Affirmed.

RUDKIN, C. J., CHADWICK, FULLERTON, and GOSE, JJ., concur.

[Nos. 7609, 7610, 7611, 7612. Decided July 20, 1909.]

FLORENCE EDWALL, *Respondent*, v. MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, *Appellant*.

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Appeals from judgments of the superior court for Spokane county, entered March 21, 1907, upon verdicts of juries rendered in favor of the plaintiffs, in actions upon policies of life insurance, after trials on the merits. Affirmed.

Hughes, McMicken, Dovell & Ramsey, for appellant.

Kenyon & Setters, for respondents.

PER CURIAM.—In pursuance of the stipulation of the parties, filed in the above entitled actions, and on the authority of the opinion in cause No. 7608, *Aris v. Mutual Life Ins. Co.*, ante p. 269, 103 Pac. 50, the judgments herein are affirmed.

¹Reported in 102 Pac. 870.

²Reported in 103 Pac. 52, 53.

[No. 7507. Decided August 19, 1909.]

THE STATE OF WASHINGTON, *on the Relation of A. A. Lytle, Appellant,*
v. CHARLES F. WILL *et al., Respondents.*¹

Appeal from a judgment of the superior court for Douglas county, Steiner, J., entered May 6, 1908, upon findings in favor of the defendants, after a trial before the court without a jury, in an action for a writ of mandamus. Reversed.

Hannan & Clapp and *Arthur McGuire*, for appellant.

Sam B. Hill and *John W. Hanna*, for respondents.

PER CURIAM.—This action is an application to the superior court of Douglas county by A. A. Lytle, for a writ of mandamus requiring the auditor and commissioners of said county to issue a warrant for excess salary alleged to be due relator as county sheriff. From a final judgment denying the writ, the relator has appealed.

In pursuance of a stipulation on file, and on the authority of the opinion of this court filed on this date, in cause No. 7506, *State ex rel. Maltbie v. Will*, ante p. 453, 103 Pac. 479, 104 Pac. 797, the judgment of the superior court is reversed, and the cause remanded with instructions to grant a writ of mandate directing the issuance of a warrant to appellant for additional salary from January 9, 1905, to January 14, 1907, at the rate of \$50 per annum. The appellant will recover his costs in this court and in the superior court, including statutory attorney's fees.

[No. 7508. Decided August 19, 1909.]

THE STATE OF WASHINGTON, *on the Relation of W. J. Canton,*
Appellant, v. CHARLES F. WILL *et al., Respondents.*¹

Appeal from a judgment of the superior court for Douglas county, Steiner, J., entered May 6, 1908, upon findings in favor of the defendants, after a trial before the court without a jury, in an action for a writ of mandamus. Reversed.

Hannan & Clapp and *Arthur McGuire*, for appellant.

Sam B. Hill and *John W. Hanna*, for respondents.

PER CURIAM.—This action is an application to the superior court of Douglas county by W. J. Canton, for a writ of mandamus requiring the auditor and commissioners of said county to issue a warrant

¹Reported in 103 Pac. 482.

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for excess salary alleged to be due relator as prosecuting attorney. From a final judgment denying the writ, the relator has appealed.

In pursuance of a stipulation on file, and on the authority of the opinion of this court filed on this date, in cause No. 7506, *State ex rel. Maltbie v. Will*, ante p. 453, 103 Pac. 479, 104 Pac. 797, the judgment of the superior court is reversed, and the cause remanded with instructions to grant a writ of mandate directing the issuance of a warrant to appellant for additional salary from January 9, 1906, to January 14, 1907, at the rate of \$100 per annum. The appellant will recover his costs in this court and in the superior court, including statutory attorney's fees.

[No. 7509. Decided August 19, 1909.]

THE STATE OF WASHINGTON, on the Relation of *E. F. Elliot*,
Appellant, v. *CHARLES F. WILL et al.*, *Respondents*.¹

Appeal from a judgment of the superior court for Douglas county, Steiner, J., entered May 6, 1908, upon findings in favor of the defendants, after a trial before the court without a jury, in an action for a writ of mandamus. Reversed.

Hannon & Olapp and *Arthur McGuire*, for appellant.
Sam B. Hill and *John W. Hanna*, for respondents.

PER CURIAM.—This action is an application to the superior court of Douglas county by E. F. Elliot, for a writ of mandamus requiring the auditor and commissioners of said county to issue a warrant for excess salary alleged to be due relator as superintendent of schools. From a final judgment denying the writ, the relator has appealed.

In pursuance of a stipulation on file, and on the authority of the opinion of this court filed on this date, in cause No. 7506, *State ex rel. Maltbie v. Will*, ante p. 453, 103 Pac. 479, 104 Pac. 797, the judgment of the superior court is reversed, and the cause remanded with instructions to grant a writ of mandate directing the issuance of a warrant to appellant for additional salary from September 1, 1905, to the end of his term in September, 1907, at the rate of \$100 per annum. The appellant will recover his costs in this court and in the superior court, including statutory attorney's fees.

¹Reported in 103 Pac. 482.

[No. 7510. Decided August 19, 1909.]

THE STATE OF WASHINGTON, *on the Relation of Charles F. Will, Appellant*, v. JOHN MCKAY *et al.*, *Respondents*.¹

Appeal from a judgment of the superior court for Douglas county, Steiner, J., entered May 6, 1908, upon findings in favor of the defendants, after a trial before the court without a jury, in an action for a writ of mandamus. Reversed.

Hannan & Clapp and *Arthur McGuire*, for appellant.
Sam B. Hill and *John W. Hanna*, for respondents.

PER CURIAM.—This action is an application to the superior court of Douglas county by Charles F. Will, for a writ of mandamus requiring the county commissioners of said county to issue a warrant for excess salary alleged to be due relator as county auditor. From a final judgment denying the writ, the relator has appealed.

In pursuance of a stipulation on file, and on the authority of the opinion of this court filed on this date, in cause No. 7506, *State ex rel. Matthe v. Will*, ante p. 453, 103 Pac. 479, 104 Pac. 797, the judgment of the superior court is reversed, and the cause remanded with instructions to grant a writ of mandate directing the issuance of a warrant to appellant for additional salary from January 9, 1905, to January 14, 1907, at the rate of \$50 per annum. The appellant will recover his costs in this court and in the superior court, including statutory attorney's fees.

[No. 7511. Decided August 19, 1909.]

THE STATE OF WASHINGTON, *on the Relation of E. C. Davis, Appellant*, v. CHARLES F. WILL *et al.*, *Respondents*.²

Appeal from a judgment of the superior court for Douglas county, Steiner, J., entered May 6, 1908, upon findings in favor of the defendants, after a trial before the court without a jury, in an action for a writ of mandamus. Reversed.

Hannan & Clapp and *Arthur McGuire*, for appellant.
Sam B. Hill and *John W. Hanna*, for respondents.

PER CURIAM.—This action is an application to the superior court of Douglas county by E. C. Davis, for a writ of mandamus requiring the auditor and commissioners of said county to issue a warrant for

¹Reported in 103 Pac. 482.

²Reported in 103 Pac. 483.

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excess salary alleged to be due relator as county treasurer. From a final judgment denying the writ, the relator has appealed.

In pursuance of a stipulation on file, and on the authority of the opinion of this court filed on this date, in cause No. 7506, *State rel. Maltbie v. Will*, ante p. 453, 103 Pac. 479, 104 Pac. 797, the judgment of the superior court is reversed, and the cause remanded with instructions to grant a writ of mandate directing the issuance of a warrant to appellant for additional salary from January 9, 1905, to January 14, 1907, at the rate of \$50 per annum. The appellant will recover his costs in this court and in the superior court, including statutory attorney's fees.

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Of water rights in public lands, see WATER AND WATER COURSES, 1-3, 5, 6.

ARGUMENT OF COUNSEL:

Ground for new trial, see NEW TRIAL, 1.
In civil actions, see TRIAL, 2.

ASSAULT:

As element of lesser offense in prosecution for incest, see CRIMINAL LAW, 9.

ASSENT:

Meeting of minds necessary to performance of contract, see SPECIFIC PERFORMANCE, 2.

ASSESSMENT:

Of compensation for property taken for public use, see **EMINENT DOMAIN**.

For public improvements, see **MUNICIPAL CORPORATIONS**, 1-3.

Of tax, see **TAXATION**, 1-3.

ASSIGNMENT:

Of corporate shares, see **CORPORATIONS**, 1, 2.

Liability of contractor upon assigning contract for acts of independent contractor, see **EXPLOSIVES**, 1.

Of leases, see **LANDLORD AND TENANT**.

Of contract for public improvements, see **MUNICIPAL CORPORATIONS**, 4-6.

ASSUMPTION:

Of risk by employee, see **MASTER AND SERVANT**, 12-14, 28.

ATTORNEY AND CLIENT:

Review of discretionary action in disbarring attorney, see **APPEAL AND ERROR**, 13.

Attorneys' fees as costs, see **COSTS**, 1.

Retention of client's check as estoppel to sue for larger fee, see **ESTOPPEL**, 2.

Manner of serving notice on attorney, see **MOTIONS**.

Misconduct of counsel ground for new trial, see **NEW TRIAL**, 1.

Service of process on attorney, see **PROCESS**, 2.

Purchase of debatable title as defense in action to remove cloud, see **QUIETING TITLE**, 3.

Argument or conduct of counsel at trial in civil actions, see **TRIAL**, 2.

1. **ATTORNEY AND CLIENT—DISBARMENT—GROUNDS—ACTS INVOLVING MORAL TURPITUDE—FALSE CERTIFICATES OF NOTARY.** An attorney is guilty of an act of moral turpitude, within Bal. Code, § 4775, authorizing his disbarment, where, acting as a notary public, he at divers times falsely certified, in his jurat and certificate to affidavits to be used in claims for pensions, that the witnesses appeared before him and were sworn and acknowledged the execution of the papers. *In re Hopkins* 569
2. **ATTORNEY AND CLIENT—EMPLOYMENT—CONSTRUCTION OF CONTRACT—COLLECTION OR COMPROMISE—PERFORMANCE—EVIDENCE.** Where attorneys are employed by a stockholder in a bank to bring action against the bank for an accounting for alleged undivided profits, under an agreement that the client would pay them ten per cent on the amount collected "in case of a compromise" of the suit, and not to exceed \$200 "in case of settlement by sale or exchange of the stock," and after suit brought, it was dismissed by the client upon receiving \$14,833 in cash and certain shares in another bank in exchange for his shares, the attorneys, in an action for their services,

ATTORNEY AND CLIENT—CONTINUED.

are entitled to show that the market value of the shares received was equal to the market value of the shares exchanged, and that the transaction was in fact a compromise of the suit by a cash payment, within the meaning of their contract of employment, entitling them to ten per cent of the collection. *Cain v. Moore*..... 627

3. **SAME—LIABILITY—FRAUD.** In such a case, it would not be necessary for the attorneys to plead or prove fraud on the part of their client. *Cain v. Moore*..... 627

4. **SAME—EVIDENCE—NATURE OF COLLECTION—VALUE OF STOCK EXCHANGED.** To determine whether or not the client collected a pecuniary consideration on the compromise, over and above the value of the stock given in exchange, the stock must be taken at its market value and not at its actual value by reason of the undivided profits to collect which the suit was instituted. *Cain v. Moore*..... 627

AUTHORITY:

- Of corporate officers or agents, see **CORPORATIONS**, 3.
- Of county commissioners to control litigation, see **COUNTIES**, 1.
- Issuance of bonds in payment of unauthorized contract, see **MUNICIPAL CORPORATIONS**, 7-9.
- Of land commissioner to review and reconsider official acts relating to public lands, see **PUBLIC LANDS**, 2.
- Of tax commission in assessing railroad property, see **TAXATION**, 1-3.

BAILIFF:

Misconduct not ground for new trial, see **CRIMINAL LAW**, 12.

BAR:

- Renewal of attempt to create conspiracy as removal of limitation by lapse of time, see **CRIMINAL LAW**, 1.
- Dismissal of complaint as bar to other prosecution, see **CRIMINAL LAW**, 2, 3.
- Of action by former adjudication, see **JUDGMENT**, 7, 8.
- Of action to redeem property by failure to pay taxes, see **TAXATION**, 6.

BARROOMS:

Maintenance by social club without license, see **INTOXICATING LIQUORS**, 1, 2.

BENEFITS:

- Acceptance of as ground of estoppel, see **ESTOPPEL**, 2.
- Assessment of benefits caused by construction of public improvements, see **MUNICIPAL CORPORATIONS**, 1-3.

BETTERMENTS:

Recovery in ejectment, see **EJECTMENT**, 5.

BETTING:

See **GAMING**.

BILLS AND NOTES:

Acceptance as suspension of action on account, see **ACTION**, 2.

Retention of check as ground of estoppel, see **ESTOPPEL**, 2.

New promise to pay as removal of bar of statute, see **LIMITATION OF ACTIONS**.

1. **BILLS AND NOTES—CONSIDERATION—CONTRACTS—FORFEITURE CLAUSE—WAIVER.** A note given in payment for a rate installment on an investment bond, the bond stipulating for annual payments and providing that the bond should be void in case the note is not paid upon maturity, is valid and upon sufficient consideration, where the holder of the bond elects to treat it as in force and sues upon the bond; since it can waive the provisions for its forfeiture, and the word "void" should be construed to mean "voidable." *Pacific Northwest Investment Society v. Cunningham*..... 284
2. **BILLS AND NOTES—CONDITIONS—NEW PROMISE TO PAY WITHIN REASONABLE TIME.** Upon a promise to pay a note as soon as the promisor "is able to spare the money, or a reasonable time," is not a promise to pay upon condition, but is an absolute promise to pay within a reasonable time, which has expired after the lapse of nearly three years. *Thisler v. Stephenson*..... 605
3. **BILLS AND NOTES—NOTICE OF DISHONOR—DEFAULT IN INTEREST.** Default in the payment of interest is not notice to a holder in due course of dishonor, but it is competent upon the question of good faith. *Ireland v. Scharpenberg*..... 558
4. **BILLS AND NOTES—BONA FIDE PURCHASERS—TRANSFER AFTER MATURITY—EQUITIES BETWEEN INTERMEDIATE HOLDERS.** While the innocent purchaser of a note after maturity takes the same subject to equities between the original parties, the rule has no application to, and he is not charged with, equities affecting intermediate holders or indorsers, where there was no illegality in the inception of the note. *Reardan v. Cockrell*..... 400
5. **SAME—PAYMENTS—NEGLIGENCE OF PAYOR.** Where the payors caused a note to be placed in the hands of a third party to be negotiated, and made payments, which through their negligence were not indorsed thereon, to the injury of an innocent third party purchasing the note, the negligent payors must stand the loss. *Reardan v. Cockrell* 400
6. **BILLS AND NOTES—PLACE FOR PAYMENT.** Where no place of payment is expressed in a note, it is payable where the maker resides or at his usual place of business. *Bardsley v. Washington Mill Co.* 553

BILLS AND NOTES—CONTINUED.

7. **BILLS AND NOTES—MATURITY—DEFAULT IN INTEREST—ELECTION TO DECLARE DUE—DEMAND—PRESENTMENT.** The holder of a note cannot exercise the option expressed therein to declare the whole sum due for default in the payment of an interest installment, without presentment, demand and refusal, where the note specified no place for payment, and the makers had an established place of business known to the holder, and were at all times ready to pay the interest due. *Bardsley v. Washington Mill Co.*..... 553
8. **BILLS AND NOTES—FRAUD—BONA FIDE PURCHASER—BURDEN OF PROOF—EVIDENCE—SUFFICIENCY.** In an action upon a note procured by fraud, the burden being upon the plaintiff to show that he is the holder in due course, it is error for the court to decide, as a matter of law, that the plaintiff had no notice of the fraud, where there was no evidence as to the manner, consideration, or time of the purchase of the note, save that of one of the plaintiffs, and one installment of interest was past due at the time; since the credibility of the witness would be for the jury, although he was not contradicted by any direct evidence. *Ireland v. Scharpenberg*..... 558
9. **BILLS AND NOTES—EVIDENCE—CONSIDERATION.** Upon the defense of fraud in an action upon a note, which had been detached from the written contract in consideration of which the note was given, the defendants are entitled to introduce the contract in evidence as part of the original transaction and to show the consideration for the note. *Ireland v. Scharpenberg*..... 558
10. **BILLS AND NOTES—FRAUD—BONA FIDE PURCHASER—EVIDENCE—ADMISSIBILITY.** In an action upon a note, upon an issue as to whether the plaintiffs were holders in due course, it being claimed that they were mere figureheads and without interest in the suit, it is error to exclude evidence that \$200 had been deposited with the clerk as security for costs and that the plaintiffs knew nothing about the deposit. *Ireland v. Scharpenberg*..... 558

BLASTING:

Injuries from blasting, see **EXPLOSIVES**, 1.

BONA FIDE PURCHASER:

Of bill or promissory note, see **BILLS AND NOTES**, 4, 5, 8, 10.

Of property sold under execution, see **EXECUTION**, 3.

BONDS:

Supersedeas and stay of proceedings on appeal, see **APPEAL AND ERROR**, 9.

Municipal bonds, see **MUNICIPAL CORPORATIONS**, 7-9.

BOOMS:

See **NAVIGABLE WATERS**, 1-4, 6, 11, 13.

BOUNDARIES:

Rights of purchasers on street bordering on lake, see **DEDICATION**.

Establishment of shore line of lake, see **PUBLIC LANDS**, 5.

Fraud of agent in pointing out to purchaser, see **VENDOR AND PURCHASER**, 5-7.

BREACH:

Of contract in general, see **CONTRACTS**.

Of covenants, see **COVENANTS**.

Of contract of employment, see **MASTER AND SERVANT**, 1.

Of contract for sale of land, see **VENDOR AND PURCHASER**.

BRIDGES:

Consent to bridge stream as condition precedent to condemn tide lands, see **EMINENT DOMAIN**, 15.

1. **BRIDGES—NEGLIGENCE—EVIDENCE—SUFFICIENCY.** A county is not guilty of negligence from the fact that the sweep at the center of the draw span of a bridge was placed in position for use in emergency, pointing diagonally across the bridge, three feet from the floor, without any light thereon, the night being dark, and which resulted in the death of a person running across the bridge, where the bridge was closed to traffic and in jeopardy from high water, and the deceased had been warned off the bridge and knew of the emergency and that the draw span might be opened at any time. *Pederson v. Skagit County* 637
2. **SAME—CONTRIBUTORY NEGLIGENCE.** In such a case, the deceased was guilty of contributory negligence in running against the sweep, and assumed the risks, where others crossing the bridge at the same time saw the sweep and avoided it, the way was dark requiring caution, and he was not in the walkway prepared for footmen. *Pederson v. Skagit County* 637

BROKERS:

Persons having possession or control of goods for purpose of sale, see **FACTORS**.

Agreement for commissions and sale of real estate as within statute of frauds, see **FRAUDS, STATUTE OF**.

Judgment of dismissal as bar to second action for services, see **JUDGMENT**, 7.

Fraud of agents in pointing out boundaries of land, see **VENDOR AND PURCHASER**, 5-7.

1. **BROKERS—FRAUD OF AGENT—PURCHASE AND RESALE OF PROPERTY—EVIDENCE—SUFFICIENCY.** The evidence sufficiently shows that a real estate agent, taking property in his own name and deeding it to the plaintiff, his client, at an advanced price, purchased the property for the plaintiff in the first instance and was guilty of a fraud in concealing the advance in price, and findings to the contrary are

BROKERS—CONTINUED.

- erroneous, where it appears from the deposition of the vendor, a disinterested witness, whose testimony was clear, full, and circumstantial, that the agent informed her that he was buying for a French lady (the plaintiff) and not for himself, that such witness was corroborated by the plaintiff, that the agent did not pretend that he informed plaintiff he was selling her his own property, the relationship of the parties having been that of principal and agent for some time, the agent making various deals for the plaintiff and carrying plaintiff's money in bank in his own name. *De L'Archerie v. Rutherford* 134
2. **SAME.** It is a constructive fraud for a broker not to inform his principal that he was the owner of the property sold. *De L'Archerie v. Rutherford* 134
3. **BROKERS—PRINCIPAL AND AGENT—FRAUD ON PRINCIPAL—SECRET PROFIT.** Brokers, authorized to make a sale of property at \$4,000, one-half cash, are guilty of a constructive fraud upon their principal and are liable for secret profits made by them, where, in order to effect such sale, they made tentative arrangements to sell to S. for \$4,500, \$500 to be paid in cash, procured the vendor's consent to a sale to W. for \$4,000, one-half cash, and secretly arranged a resale from W. to S. for \$4,500, \$500 cash, according to the tentative agreement, without informing the vendor of such resale or of the fact that W. paid the brokers an additional commission of \$150; as the brokers secretly made an additional profit of \$150 and prevented the vendor from accepting the first sale at \$4,500, and making other arrangements for one-half cash, it being their duty to communicate such offer of S. to their principal. *Easterly v. Mills*..... 356
4. **SAME—COMMISSIONS—CONSTRUCTIVE FRAUD.** In such a case, the brokers will not lose their commissions on the original sale, paid by the vendor, where the vendor in her complaint admitted that they were entitled thereto. *Easterly v. Mills*..... 356

BURDEN OF PROOF:

- To show correction in public record, see ALTERATION OF INSTRUMENTS, 2.
- To show holder in due course, see BILLS AND NOTES, 8.
- To overcome fraud and undue influence, see CANCELLATION OF INSTRUMENTS, 3.
- To show valid service of process, see JUDGMENT, 1.
- Instructions, see TRIAL, 5.

CANCELLATION OF INSTRUMENTS:

- Rescission of contract of sale of land, see VENDOR AND PURCHASER, 2, 3.
1. **CANCELLATION OF INSTRUMENTS—FRAUD—UNDUE INFLUENCE—WANT OF CAPACITY—EVIDENCE—SUFFICIENCY.** Fraud will be inferred and a

CANCELLATION OF INSTRUMENTS—CONTINUED.

deed set aside for want of capacity, where it appears that the grantor, an aged inmate of a charity hospital, upon inheriting an estate to the value of \$20,000 through the death of his son, suffered a general break down and made voluntary conveyances of all the property to one heir to the exclusion of others, without any natural reason therefor, at a time when his mind was so weakened that he was peculiarly susceptible to influence, and he probably did not have sufficient intelligence to understand the nature of the transaction.

Hattie v. Potter 170

2. CANCELLATION OF INSTRUMENTS—DEEDS—FRAUD—INCAPACITY OF GRANTOR. There is sufficient evidence to warrant the cancellation of a deed for incapacity of the grantor, where it appears that he was a weak old man, 88 years of age, incoherent in his talk, with delusions that his son and others were trying to poison him, and a physician testified that he was totally incompetent to transact business, and he had sold the land worth \$3,000 for \$1,250. *Castle v. Dole* 585

3. SAME—CONVEYANCE FROM PARENT TO CHILD—UNDUE INFLUENCE—BURDEN OF PROOF. When an aged parent conveys all his property to a daughter to the exclusion of other heirs, without any consideration for his future support, the burden of proof is upon the grantee to show by clear and convincing evidence that it was fair and fully understood by the grantor. *Hattie v. Potter* 170

CARRIERS:

Excessive damages for injury to passenger, see DAMAGES, 4, 5.

Injuries to railroad employee, see MASTER AND SERVANT, 1, 2, 11, 15, 17-24, 27, 30.

1. CARRIERS—WHO ARE PASSENGERS—INVITATION TO GO ON TRACK—TRESPASSERS. A passenger who took a street car to a certain destination, without being informed of a washout preventing the car from making the trip, is a passenger while walking across a trestle, on the invitation of the conductor, in order to transfer over the washout to a car at the other end of the trestle, regardless of what agency caused the washout, or of the fact that no written transfer was issued; and instructions that she was a trespasser are properly refused. *Bugge v. Seattle Electric Co.* 483
2. CARRIERS—INJURY TO PASSENGER—NEGLIGENCE—INVITATION TO GO ON TRACK. It is negligence, warranting a recovery by a passenger, run down on a long trestle, for the street car company to invite passengers to transfer over a washout by crossing the trestle in the dark, with the assurance that no cars would cross the trestle that night, and while passengers were walking on the trestle to run them down by a car going in the opposite direction. *Bugge v. Seattle Electric Co.* 483

CARRIERS—CONTINUED.

3. **CARRIERS—NEGLIGENCE—NOTIFICATION TO PASSENGERS ALIGHTING—EVIDENCE—RES GESTAE.** In an action against a carrier for negligently instructing a passenger to walk across a trestle to transfer over a washout to another car, evidence that such a notification was given to another passenger, and communicated to the plaintiff, is admissible as part of the *res gestae*, although not given in plaintiff's presence, where the car stopped at the washout and many passengers got out and started to walk across the trestle, and there was conflict in the testimony as to the notification. *Bugge v. Seattle Electric Co.* 483
4. **SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.** In such a case, the contributory negligence of the passenger was for the jury, where she had no notice of the height of the trestle some distance away, there was necessity of avoiding delay, and many other passengers were crossing. *Bugge v. Seattle Electric Co.*..... 483

CAVEAT EMPTOR:

See **VENDOR AND PURCHASER**, 1.

CENSUS:

Salaries of county officers graded by population, see **COUNTIES**, 2.

CERTIFICATE:

To statement of facts or bill of exceptions, see **APPEAL AND ERROR**, 11.
Of engineer as to performance of contract, see **CONTRACTS**, 1.

CERTIORARI:

1. **CERTIORARI—WHEN LIES—DENIAL OF TEMPORARY INJUNCTION—ADEQUATE REMEDY.** Certiorari does not lie to review an order denying a temporary injunction, since it is not reviewable on appeal unless there is a finding that the parties against whom the injunction is sought are insolvent, under Bal. Code, § 6500, subd. 3, and there is an adequate remedy by appeal from the final judgment or by an action at law for damages. *State ex rel. Mohr v. Superior Court* 225
2. **CERTIORARI—WHEN LIES—STRIKING COMPLAINT—ADEQUATE REMEDY BY APPEAL.** Certiorari will not lie to review an order striking an amended complaint, as it is not subject to review except on appeal from the final judgment. *State ex rel. Mohr v. Superior Court.*.. 225

CESSATION OF CONTROVERSY:

On appeal, see **APPEAL AND ERROR**, 1, 2.

CHALLENGE:

To panel, see **JURY**, 3.

CHARACTER:

Of accused as evidence, see **CRIMINAL LAW**, 5.

CHARGE:

To jury in criminal prosecutions, see **CRIMINAL LAW**, 9.

To jury in civil actions, see **TRIAL**, 4-7.

CHATTEL MORTGAGES:

Of community property by husband, see **HUSBAND AND WIFE**, 4.

1. **CHATTEL MORTGAGES—FORECLOSURE—DECREE—DEFICIENCY.** The right to a deficiency judgment in an action to foreclose a chattel mortgage depends upon statute. *Bradley Engineering and Machinery Co. v. Muzzy* 227
2. **SAME—STATUTES—CONSTRUCTION.** The legislature did not intend to merely regulate the procedure, by Laws 1899, p. 85, § 2, authorizing deficiency judgments upon the foreclosure of a mortgage if consented to in the agreement, and denying a deficiency judgment when stipulated against in the mortgage, and the same will not be construed as prohibiting deficiency judgments in foreclosures of mortgages which contain no stipulation as to deficiencies; since that would simply drive the creditor to two actions to recover the debt, a result that would have been provided in express terms and not left to implication. *Bradley Engineering and Machinery Co. v. Muzzy* 227
3. **CHATTEL MORTGAGES—DECREE—DEFICIENCY JUDGMENT.** Bal. Code, § 5880, expressly authorizes a deficiency judgment in an action to foreclose a chattel mortgage, where there is a separate obligation for the payment of the debt. *Bradley Engineering and Machinery Co. v. Muzzy* 227
4. **CHATTEL MORTGAGES—PROPERTY INCLUDED—ESTOPPEL.** The owner of a machine having included it in a chattel mortgage executed by him on behalf of a corporation of which he owned all the stock, is estopped to assert that the same is his property and not subject to the mortgage. *First National Bank of Wenatchee v. Fowler*.... 65

CITATION:

See **PROCESS**.

CITIES:

See **MUNICIPAL CORPORATIONS**.

CLAIMS:

Against county, see **COUNTIES**, 3, 4.

Mining claims, see **MINES AND MINERALS**.

Against municipal corporations, see **MUNICIPAL CORPORATIONS**, 10.

CLASS LEGISLATION:

See CONSTITUTIONAL LAW.

CLOUD ON TITLE:

See QUIETING TITLE.

CLUBS:

Sale of liquor without license, see INTOXICATING LIQUORS, 1, 2.

COLLATERAL ATTACK:

On judgment, see JUDGMENT, 6.

COLLISION:

Injuries to railroad employee, see MASTER AND SERVANT, 3, 11, 20, 30.
Between street cars or with vehicles, see STREET RAILROADS.

COMMERCE:

Carriage of goods and passengers, see CARRIERS.

COMMISSIONS:

Of broker, see BROKERS, 3, 4.
Of factors, see FACTORS.

COMMON CARRIERS:

See CARRIERS.

COMMUNITY PROPERTY:

Administration of, see EXECUTORS AND ADMINISTRATORS.
In general, see HUSBAND AND WIFE.
Competency of husband or wife in proceedings on judgment for community debt, see WITNESSES, 1.

COMPENSATION:

Of attorney, see ATTORNEY AND CLIENT, 2-4.
For performance of contract, see CONTRACTS, 1.
Of county officers in general, see COUNTIES, 2.
For property taken for public use, see EMINENT DOMAIN, 7-11, 16-18, 20, 21.

COMPETENCY:

Of evidence in criminal prosecution, see CRIMINAL LAW, 5.
Of witnesses in general, see WITNESSES.

COMPROMISE AND SETTLEMENT:

Payment of judgment as cessation of controversy, see APPEAL AND ERROR, 2.
Compensation of attorney on compromise of suit by client, see ATTORNEY AND CLIENT, 2-4.

CONCLUSIVENESS:

Of certificate of engineer as to performance of contract, see **CONTRACTS**, 1.

Of verdict on question of damages, see **EMINENT DOMAIN**, 18.

Of recitals in judgment, see **JUDGMENT**, 6.

CONDEMNATION:

Taking property for public use, see **EMINENT DOMAIN**.

CONDITIONS:

Precedent to action against county, see **COUNTIES**, 3.

Precedent to condemnation proceedings, see **EMINENT DOMAIN**, 13-15.

Precedent to action to annul tax judgment, see **TAXATION**, 7-10, 13.

CONSIDERATION:

Of bill of exchange or promissory note, see **BILLS AND NOTES**, 1, 9.

CONSOLIDATION:

Of actions, see **ACTION**, 1.

CONSPIRACY:

Limitation of prosecution for conspiracy to create monopoly in sale of milk, see **CRIMINAL LAW**, 1.

1. **CONSPIRACY — MONOPOLIES — SALE OF MILK — INFORMATION—SUFFICIENCY.** An information sufficiently charges a conspiracy at common law, to control the price of milk, in the city of S. when it alleges that the defendants unlawfully designing to prevent open competition, unlawfully agreed not to sell milk lower than certain fixed prices and not to sell to each other's customers, and agreed to and did raise prices with intent to control the price of milk generally in said city; and it is immaterial that only part of the milk dealers of the city entered into the same, since the purpose of their agreement was to create a monopoly. *State v. Erickson*..... 472
2. **SAME—EVIDENCE—ADMISSIBILITY—LETTERS OF CO-CONSPIRATOR.** In a prosecution for conspiracy to create a monopoly in the sale of milk, letters written by one of the parties to the agreement a few days thereafter, showing on their face that they were written in furtherance of the conspiracy, are admissible against a defendant who was absent when they were written. *State v. Erickson*.... 472
3. **SAME—EVIDENCE—ADMISSIBILITY.** In a prosecution for a conspiracy to create a monopoly to control the price of milk in a city, evidence on the part of the defendant that there were a number of other milk dealers in the city who had not entered into the agreement is immaterial. *State v. Erickson*..... 472

CONSTITUTIONAL LAW:

- Establishment and organization of courts, see **COURTS**, 1-3.
- Habitual criminal statute, validity and effect, see **CRIMINAL LAW**, 14.
- Practice of medicine, see **PHYSICIANS AND SURGEONS**.
- Subjects and titles of statutes, see **STATUTES**, 1.

1. **CONSTITUTIONAL LAW—CLASS LEGISLATION—PUBLIC LANDS—SALES—PURPOSES.** An act authorizing the sale of certain school lands for cemetery purposes, is not unconstitutional as granting special privileges to any citizen or class of citizens, in violation of Const. art. 1, § 12. *Day v. Richardson*..... 288

CONSTRUCTION:

- Of contract for compensation and employment, see **ATTORNEY AND CLIENT**, 2-4.
- Of statute authorizing deficiency judgment, see **CHattel MORTGAGES**, 2.
- Of contract for liquidated damages on termination of agency agreement, see **DAMAGES**, 1.
- Intent as to reservations in dedication of street, see **DEDICATION**, 1.
- Of contract for sale of goods on commission, see **FACTORS**.
- Of law requiring safeguarding of machinery, see **MASTER AND SERVANT**, 6.
- Of statute relating to relocation of forfeited claims, see **MINES AND MINERALS**, 4.
- Of statute giving preference right to purchase shore lands, see **PUBLIC LANDS**, 4.
- Of stipulation, see **STIPULATIONS**.
- Of grant of right of way for water ditch, see **WATERS AND WATER COURSES**, 18-20.
- Of statute granting prior right to waters of springs, see **WATERS AND WATER COURSES**, 2, 11.

CONTINUANCE:

1. **CONTINUANCE—GROUNDS—TIME FOR APPLICATION—SHOWING.** It is not an abuse of discretion to deny a continuance in a condemnation case, asked when the case was called on February 26th, because the ground was covered with snow and could not be shown to the witnesses, where the party made no objection on February 10th to the setting of the case for trial on February 14th, and made no showing that conditions had changed, and where the opposite party was in court ready for trial when the case was called. *Fruitland Irrigation Co. v. Smith* 185

CONTRACTORS:

- Liability for acts of independent contractors, see **EXPLOSIVES**, 1.
- Liability for damages to property after assignment of contract for street improvement, see **MUNICIPAL CORPORATIONS**, 4-6.

CONTRACTS:

- Between attorney and client, see **ATTORNEY AND CLIENT**, 2-4.
 Bills and notes, see **BILLS AND NOTES**.
 Compensation of broker, see **BROKERS**, 3, 4.
 Of contracts between officers and corporations, see **CORPORATIONS**, 3.
 Subscription to corporate stock, see **CORPORATIONS**, 2.
 Covenants in deeds, see **COVENANTS**.
 Damages for breach, see **DAMAGES**, 1, 3.
 Liquidated damages or penalties, see **DAMAGES**, 1.
 Parol evidence to vary, see **EVIDENCE**, 3-6.
 For sale of goods on commission, see **FACTORS**.
 Agreement within statute of frauds, see **FRAUDS, STATUTE OF**.
 Of insurance in general, see **INSURANCE**.
 Of employment, see **MASTER AND SERVANT**, 1.
 For public improvements, see **MUNICIPAL CORPORATIONS**, 4-7.
 Of suretyship, see **PRINCIPAL AND SURETY**.
 Sales of personalty, see **SALES**.
 Right to counterclaim on tort in action arising on contract, see
 SET-OFF AND COUNTERCLAIM.
 Specific performance, see **SPECIFIC PERFORMANCE**.
 Sale of land, see **VENDOR AND PURCHASER**.
 Rescission of sale of land, see **VENDOR AND PURCHASER**, 2, 3.
1. **CONTRACTS — PERFORMANCE — CERTIFICATE OF ENGINEER — CONCLUSIVENESS.** Where a railroad grading contract made two prices, one for the excavation of solid rock and one for the excavation of loose rock, under supervision by the company's engineers, and made the chief engineer's certificate final and conclusive as to the "quantities of the various kinds of work done," and an engineer's certificate, made advisedly and under direction from the chief engineer, included the excavation of "hard pan" as part of the "solid rock," a subcontractor is entitled to pay for the same from the principal contractor on the basis of payment for "solid rock"; as the contractor would recover pay from the company on the same basis. *Pinickneff v. Johnson* 156
 2. **CONTRACTS—PERFORMANCE—EXCUSE FOR NONPERFORMANCE.** In an action on an express contract for services, failure of the plaintiffs to perform their part is excused by acts of defendants preventing performance. *Blair v. Wilkeson Coal & Coke Co.*..... 334
 3. **SAME—PREVENTING PERFORMANCE—DEMAND—NECESSITY.** In an action for a balance due upon contract, an express demand that plaintiffs be allowed to complete performance on their part is not necessary when defendant ordered plaintiffs to quit work and refused further payments. *Blair v. Wilkeson Coal & Coke Co.*..... 334
 4. **CONTRACTS—BREACH—EVIDENCE—SUFFICIENCY.** A finding that a railroad contractor breached his contract with a subcontractor by

CONTRACTS—CONTINUED.

ordering him to cease work is sustained by the evidence, where the subcontractor testified that the contractor's foreman ordered him to cease, and a letter from the contractor shortly after states that if he had been on the ground in place of the foreman the subcontractor would not have had a chance as long as he did have. *Pinickneff v. Johnson* 156

CONTRIBUTORY NEGLIGENCE:

Of person in colliding with sweep on draw span, see **BRIDGES**.
Of passenger injured while crossing trestle, see **CARRIERS**, 4.
Of person injured by explosion of chemicals, see **EXPLOSIVES**, 2, 4.
Of servant, see **MASTER AND SERVANT**, 16, 17, 28, 29.
Of person injured at railroad crossing, see **RAILROADS**.
Of driver of wagon in collision with street car, see **STREET RAILROADS**.

CONVERSION:

Wrongful conversion of personal property, see **TROVER AND CONVERSION**.

CONVEYANCES:

Cancellation for fraud and undue influence, see **CANCELLATION OF INSTRUMENTS**.
Of personal property as security for debt, see **CHattel MORTGAGES**.
Separate property of married women, see **HUSBAND AND WIFE**, 2, 3.
By husband or wife, see **HUSBAND AND WIFE**, 2-4.
Transfer of interest as forfeiture of insurance policy, see **INSURANCE**, 2.
In trust, see **TRUSTS**.
Water rights, see **WATERS AND WATER COURSES**, 18-21.

CONVICTS:

Nature and extent of punishment, see **CRIMINAL LAW**, 14.

CORPORATIONS:

Subscription to capital stock as condition precedent to condemnation by railroad, see **EMINENT DOMAIN**, 13, 14.
Fraud in sale of stock, see **FRAUD**.
Franchise to gas companies, see **GAS**.
Municipalities, see **MUNICIPAL CORPORATIONS**.

1. **CORPORATIONS—STOCK—TRANSFER ON BOOKS—NECESSITY—WAIVER—ESTOPPEL.** Bal. Code, § 4261, providing that transfers of stock in a corporation are void until entered on the books of the company is for the benefit of the company and may be waived by it; and a company is estopped to deny that an assignee of stock not entered is a stockholder, after electing him a trustee and recognizing him as a stockholder by various acts. *Van Horn v. New Western Shingle Co.* 117

CORPORATIONS—CONTINUED.

2. CORPORATIONS—STOCKHOLDERS—LIABILITY—SUBSEQUENT CREDITORS—TRANSFER OF STOCK—RECORD—EVIDENCE—SUFFICIENCY. A stockholder in an insolvent corporation is not liable to a creditor for unpaid stock subscriptions, where it appears that he sold his shares while the corporation was a going concern and solvent, before the creditor acquired his claim, and that the stock books and the certificate stubs show the transfer according to the usual custom of the corporation, although it did not keep a stock ledger or strictly comply with Bal. Code, §§ 4261, 4269, concerning the record of transfers of stock; since subsequent creditors stand in the same situation as the corporation. *Iverson v. Bradrick*..... 633
3. CORPORATIONS—REPRESENTATION BY OFFICERS—EMPLOYMENT OF SERVANTS—NOTICE OF AUTHORITY. Where the by-laws of a corporation empowered the board of trustees, alone, to employ servants and assistants, a custom to allow the manager to make an oral contract of hire of a clerk, with weekly or monthly wage payments and without fixing the term, is not sufficient to authorize the manager to hire a clerk for a period of 26 weeks, when the clerk had actual knowledge of the extent of the manager's authority. *Francis v. Spokane Amateur Athletic Club* 188
4. CORPORATIONS—ACTIONS AGAINST—VENUE—ADMISSIONS AFFECTING—"DOING BUSINESS." An allegation in a complaint that the defendant is a domestic corporation "doing business" in the county of the venue, admitted by the answer, is sufficient to confer jurisdiction upon the court of that county; although the president was served in another county, and Bal. Code, § 4854, requires actions against a corporation to be commenced in any county where it "has an office for the transaction of business," or where any person resides upon whom service could be made. *Collins v. Hazel Lumber Co.*.... 524
5. CORPORATIONS—RECEIVERS—APPOINTMENT—COMPLAINT BY MINORITY STOCKHOLDERS—SUFFICIENCY. A complaint by a minority stockholder of a corporation states a sufficient cause of action for a receivership, especially when liberally construed on demurrer *ore tenus*, where it alleges that one-third of its assets and capital, of the value of \$27,000, were dissipated through maladministration and incompetence in 1908, which will continue during 1909; that it is about to lose its mill site of the value of \$4,000 or \$5,000, and suffer irreparable injury by requiring a removal, through the same causes, and that the managers have illegally voted salaries to themselves to pay for stock purchased to control the company; and it is error to confine the proof to the last allegation, as that simply goes to other charges of maladministration alleged in the complaint. *Van Horn v. New Western Shingle Co.*..... 117

CORROBORATION:

Of prosecuting witness in prosecution for incest, see INCEST.

COSERVANT:

See MASTER AND SERVANT, 9.

COSTS:

Against landowner on appeal, see EMINENT DOMAIN, 21.

1. COSTS—ATTORNEY'S FEES—MANDAMUS PROCEEDINGS. In mandamus by a county officer to secure a salary warrant, attorney's fees incurred in prosecuting the action cannot be allowed as damages, nor except as statutory taxable costs. *State ex rel. Maltbie v. Will.* 453
2. COSTS—APPEAL—FAILURE TO APPEAR. Where respondent does not appear in the supreme court, he is not entitled to costs upon affirmance of the judgment. *Johnson v. Collier*..... 478

COUNSEL:

See ATTORNEY AND CLIENT.

COUNTERCLAIM:

See SET-OFF AND COUNTERCLAIM.

COUNTIES:

Appeal from judgment against as cessation of controversy, see APPEAL AND ERROR, 2.

Liability for defects in condition or operation of bridges, see BRIDGES. Right of officer to attorney's fees in mandamus to secure salary warrant, see COSTS, 1.

Division into judicial districts, see COURTS, 1-3.

Compelling issuance of warrants for payment of salaries, see MANDAMUS.

1. COUNTIES—AUTHORITY OF COMMISSIONERS—CONTROL OF LITIGATION—PROSECUTING ATTORNEYS. Under Bal. Code, § 342, subd. 6, giving the county commissioners power to prosecute and defend all actions, the commissioners have power to direct the dismissal of an appeal from a judgment against the county, taken by the prosecuting attorney. *Prentice v. Franklin County*..... 587
2. COUNTIES—OFFICERS—SALARY—INCREASE DURING TERM. The salary of a county officer cannot be increased during the term for which he was elected by reason of an increase in the population of the county changing its classification by which the salary of its officers are determined; Const. art. 11, § 8, providing that his compensation shall not be increased after his election during his term of office; but a county officer is entitled to the salary for the classification to which the county in fact belonged at the time of his election, although the county commissioners did not determine the fact until after the election. *State ex rel. Maltbie v. Will*..... 453
3. COUNTIES—ACTIONS—CONDITIONS PRECEDENT—REJECTION OF CLAIM—RECORD OF REJECTION—LIMITATION OF ACTIONS. A claim against a

COUNTIES—CONTINUED.

county made by C. as attorney for S. P. M. and his wife H. M., for injuries sustained by the wife, filed on a certain date, is sufficiently identified and shown to have been rejected by a record of the county commissioners reciting the filing of a claim on said date by C. as attorney for H. M., referring to the place of the accident and amount of the claim, and stating "claim was rejected"; and an action thereon is barred within three months, under Bal. Code, § 359, although the claim was a community property claim, action upon which would have to be brought by the husband. *Maynard v. Jefferson County* 351

4. COUNTIES—CLAIMS—INTEREST. Upon the rejection, by the county commissioners, of a legal claim, the claimant becomes entitled to interest on the total amount of the claim from the date of its rejection. *State ex rel. Maltbie v. Will*..... 453

COUNTY COMMISSIONERS:

See COUNTIES.

Division of county into separate judicial districts, see COURTS. 1-3.

COURTS:

Law of case on appeal, see APPEAL AND ERROR, 23.

Vacation of divorce decree, see DIVORCE.

Judicial notice of record in other cause, see EVIDENCE, 1.

Appointment of administrator, see EXECUTORS AND ADMINISTRATORS.

Conclusiveness of judgments, see JUDGMENT, 7, 8.

Right to trial by jury, see JURY, 1.

Relief granted in mandamus to compel issuance of salary warrant, see MANDAMUS.

Supreme court's jurisdiction to issue prohibition, see PROHIBITION.

1. COURTS—ESTABLISHMENT—COUNTIES—DIVISION INTO JUDICIAL DISTRICTS—CONSTITUTIONAL LAW. Const. art. 4, § 5, providing that there shall be in each county of the state a superior court, with one or more judges thereof, provides for but one court in a county, and is violated by Laws 1909, p. 82, providing that the county commissioners may divide a county into independent judicial districts, each of which is a judicial unit, with its own seal, officers, records, and with jurisdictions restricted to the limits of the district, from which jurors are drawn and changes of venue granted or received, and a distinctive style of actions and proceedings is employed, and providing that in criminal actions, each district shall be considered as a separate constitutional county. *State ex rel. Lytle v. Superior Court* 378
2. SAME. Laws 1909, p. 82, providing that the county commissioners, "whenever they determine it to be for the best interests of the people," may divide a county into judicial districts each of which is constituted a "separate and distinct constitutional county" for

COURTS—CONTINUED.

- the purposes of the act, contravenes Const., art. 11, § 3, which provides that a new county shall not be formed containing less than 2,000 inhabitants. *State ex rel. Lytle v. Superior Court*..... 378
3. SAME. Said act contravenes Const., art. 4, § 6, which confers upon superior courts jurisdiction of all certain enumerated actions and proceedings arising in their respective counties. *State ex rel. Lytle v. Superior Court*..... 378
4. COURTS—RULE OF DECISION—FEDERAL QUESTION. The right of the owner of uplands, condemned for a boom site, to claim damages by reason of the value of his property as a boom site, does not raise any Federal question, where the state and not the abutter owned the tide lands condemned for the site. *Grays Harbor Boom Co. v. Lounsdale* 83

COVENANTS:

- Independent covenants in land contract, see **VENDOR AND PURCHASER**, 3.
1. COVENANTS—SEIZIN—BREACH. A covenant of ownership in fee simple is one of seizin *in presenti*, and is broken, if at all, when made. *Wick v. Rea*..... 424

CREDITORS:

- Rights and remedies of husband's creditors against wife's separate property, see **HUSBAND AND WIFE**.
- Rights and remedies of surety, see **PRINCIPAL AND SURETY**.

CRIMINAL LAW:

- See **GAMING**; **INCEST**; **ROBBERY**.
- Monopoly in sale and price of milk, see **CONSPIRACY**.
- Allegations in information, see **INDICTMENT AND INFORMATION**.
- Unlawful sale of liquor, see **INTOXICATING LIQUORS**, 1, 2.
- Practicing medicine without license, see **PHYSICIANS AND SURGEONS**.
1. CRIMINAL LAW—LIMITATIONS. A prosecution for conspiracy to create a monopoly in the sale of milk is not barred by the lapse of more than two years since such a conspiracy was first attempted, where there was a renewed attempt within one year, and the prosecution was for the latter offense. *State v. Erickson*..... 472
2. CRIMINAL LAW—PLEAS IN BAR—FORMER ACQUITTAL. The dismissal of a previous complaint or information is not a bar to another prosecution under an information charging a felony, under Bal. Code, § 6916, expressly so providing. *State v. Burns*..... 113
3. CRIMINAL LAW—PLEA IN BAR—FORMER ACQUITTAL—DEFECTIVE INFORMATION. The common law rule that an acquittal is no bar to another prosecution, if the indictment was so defective that it would

CRIMINAL LAW—CONTINUED.

not have sustained a conviction, prevails in this state, except where the acquittal was by a judgment on a verdict, as provided by Bal. Code, § 6904; hence the voluntary dismissal of such a defective charge is no bar to another prosecution. *State v. Burns*..... 113

4. CRIMINAL LAW—FORMER JEOPARDY—DISCHARGE OF JURY—NECESSITY—DISCRETION OF COURT. A plea of former jeopardy is properly overruled, where it is based on the fact that at a former trial a jury was discharged on the statement of the foreman that the jurors could not agree upon the question of the sanity of the prisoner at the time of the commission of the offense, unless the court would instruct them as to whether the prisoner would be imprisoned for life or might be subsequently released; since the necessity for such a discharge is a matter within the sound discretion of the trial court, and no abuse of discretion appears where the jury had already deliberated forty-three hours. *State v. Barnes*..... 493
5. CRIMINAL LAW—EVIDENCE—REPUTATION OF ACCUSED—WITNESSES—COMPETENCY—RAPE. Witnesses who are well acquainted with the accused, and can testify that he is a good citizen "because he behaves himself, or is a moral man," are competent to testify to his reputation for good character and chastity, although they had not heard it discussed by others, and based their evidence on observation alone; especially in a prosecution for statutory rape. *State v. Hosey* 309
6. CRIMINAL LAW—TRIAL—WITNESSES—INDORSEMENT ON INFORMATION. Under Bal. Code, § 6832, requiring the names of known witnesses to be indorsed upon the information, it is not reversible error to allow the prosecuting attorney to indorse the names of witnesses at the trial without showing that they were unknown to him before, where no continuance was asked by the accused. *State v. Le Pitre* 166
7. CRIMINAL LAW—TRIAL—VERDICTS—IMPEACHMENT. A verdict in a criminal case cannot be impeached by the affidavit of a juror showing the effect upon his mind of comment by the judge, but the impropriety of comment must be determined from the context alone. *State v. Aker*..... 342
8. SAME—MISCONDUCT OF JUDGE. A remark by the trial judge indicating that cross-examination had proceeded far enough, is not objectionable as indicating the judge's opinion as to the guilt of the accused, nor as comment on the evidence. *State v. Aker*..... 342
9. CRIMINAL LAW—TRIAL—INSTRUCTIONS—LESSER OFFENSES—ATTEMPTS—INCEST AND ASSAULT. In a prosecution for incest it is proper to refuse to instruct that the jury may find the accused guilty of an attempt to commit the crime, or of assault and battery, where any attempt made culminated in the completed offense, and there

CRIMINAL LAW—CONTINUED.

- was no charge of assault and battery, although there was evidence that the offense was committed with some force; since consent is not an element of the offense. *State v. Aker*..... 342
10. SAME—TRIAL—VERDICT—IMPEACHMENT. A verdict cannot be impeached by the affidavits of a juror that he was coerced to agree to the verdict by threats that he would be denounced to the court and, as he believed, subjected to penalties. *State v. Aker*..... 342
11. SAME—MISCONDUCT OF JUROR—NEW TRIAL. It is not misconduct warranting a new trial that a juror expressed his opinion in the jury room as to the guilt of accused before the case was submitted, where it is not claimed that the opinion was based on facts outside the evidence. *State v. Aker*..... 342
12. SAME—TRIAL—MISCONDUCT OF BAILIFF. It is not misconduct on the part of a bailiff having the jury in charge, warranting a new trial, that he opened the door during the deliberation of the jury and stood temporarily in the doorway and spoke to the jurors, when nothing is shown as to what he said, this having occurred in the presence of one of the attorneys for the accused. *State v. Aker*. 342
13. CRIMINAL LAW—APPEAL—DECISION—EFFECT. Upon reversal of a conviction for robbery because the information failed to allege the right of the person robbed to control and dominion over the property taken, the accused is not entitled to a discharge, but the case will be remanded for further proceedings. *State v. Hall*..... 142
14. CRIMINAL LAW—PUNISHMENT—HABITUAL CRIMINALS. The habitual criminal statute simply provides an increased penalty for the last offense and does not violate any constitutional right of the accused. *State v. Le Pitre*..... 166
15. CRIMINAL LAW—HABITUAL CRIMINALS—IDENTITY—EVIDENCE—SUFFICIENCY. The habitual criminal statutes authorizing the jury to find that the accused is an habitual criminal from the record of prior convictions "or" other competent evidence, is not objectionable as authorizing the finding from such records alone without proof of identification. *State v. Le Pitre*..... 166
16. SAME—EVIDENCE—HARMLESS ERROR. One convicted of being an habitual criminal is not prejudiced by erroneous admission of identity as to crimes committed outside the state, where there was sufficient evidence of other convictions in this state. *State v. Le Pitre* 166
17. SAME—EVIDENCE OF IDENTITY—PRIMA FACIE CASE. Upon a conviction of being an habitual criminal, the record of previous convictions showing the same, is sufficient *prima facie* evidence of identity, when received without objection. *State v. Le Pitre*... 166

CROPS:

- Manner of levying execution on growing crops, see **EXECUTION**, 2.
- Consent of lessor to assignment of lease on transfer of title to crops, see **LANDLORD AND TENANT**.

CROSSINGS:

- Accidents at railroad crossings, see **RAILROADS**.

CUSTOMS AND USAGES:

- Evidence of custom in flagging trains on other roads, see **MASTER AND SERVANT**, 20.

DAMAGES:

- In ejectment, see **EJECTMENT**, 2-4.
 - Compensation for appropriation under power of eminent domain, see **EMINENT DOMAIN**, 7-11, 16-18, 20, 21.
 - For fraud, see **FRAUD**.
 - Civil damages for sale of liquor causing death, see **INTOXICATING LIQUORS**, 3.
 - For breach of contract of employment, see **MASTER AND SERVANT**, 1.
 - Removal of lateral support, filing claim with city, see **MUNICIPAL CORPORATIONS**, 10.
 - Injuries from public improvements, see **MUNICIPAL CORPORATIONS**, 4-6.
 - Injuries from obstructions in navigable waters, see **NAVIGABLE WATERS**, 1, 4, 12, 13.
 - Remission of excess as condition of denying motion for new trial, see **NEW TRIAL**, 4.
 - For trespass, see **TRESPASS**.
 - Breach by vendor of contract for sale of land, see **VENDOR AND PURCHASER**, 1, 4-7.
 - For obstructing irrigating ditch, see **WATERS AND WATER COURSES**, 9, 10.
1. **DAMAGES—LIQUIDATED DAMAGES—CONTRACTS—CONSTRUCTION—TERMINATION.** Where a manufacturer's agency contract for the exclusive sale of defendant's goods fixed plaintiff's compensation at a certain sum for every case "actually sold, delivered and paid for," nothing to be paid until the money shall be received by the defendant, a provision in the contract that, in case of a sale of its manufacturing plant the defendant shall be absolved from any damage or liability by reason of the termination of, or failure to carry out, the contract, except \$500 as stipulated damages, includes loss of commission on unfilled orders for goods sold by the agent before the sale of the plant, which the defendant thereafter refused to deliver, the measure of plaintiff's damage by reason of defendant's refusal to deliver goods ordered before termination of the contract being included in the \$500 stipulated for. *West Coast Manufacturers' Agency v. Oregon Condensed Milk Co.*..... 247

DAMAGES—CONTINUED.

2. **DAMAGES—MEASURE—IMPAIRMENT OF EARNING CAPACITY—INSTRUCTIONS.** In an action for personal injuries disabling plaintiff from following his trade, where instructions as a whole plainly limited the damages to impairment of earning capacity, it is not error to refuse a request to instruct that the jury must deduct from his loss what plaintiff might be able to earn in other vocations that were open to him. *Reeks v. Seattle Electric Co.*..... 609
3. **DAMAGES—CONTRACT OF EMPLOYMENT—BREACH—MEASURE OF DAMAGES.** In an action for the breach of a contract to employ the plaintiff, the measure of damages is the agreed salary, less sums earned by the plaintiff during the term, where the jury determined that the plaintiff was not incapacitated from performing. *Meza v. Pfister Co.* 7
4. **DAMAGES—EXCESSIVE VERDICT—LOSS OF LEGS.** A verdict for \$25,000 damages for injuries sustained by a carriage maker, twenty-one years of age, capable of earning from \$4 to \$4.75 per day, will not be set aside as excessive, where one of his legs was amputated above the knee, the other was left useless; he had submitted to various operations and endured long and intense suffering, and there was nothing in the record to improperly influence the jury or to indicate passion or prejudice. *Reeks v. Seattle Electric Co.*..... 609
5. **DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT.** A verdict for \$15,000 for personal injuries is not excessive, where the plaintiff, a single woman, thirty-one years old, earning about \$75 a month as a housekeeper, was run down by a street car, her left leg cut off five inches below the knee, and her doctor's bill and other expenses amounted to \$500. *Bugge v. Seattle Electric Co.*..... 483
6. **DAMAGES—INSTRUCTIONS—ISSUES NOT SUPPORTED BY EVIDENCE.** In an action for personal injuries, it is not necessarily reversible error to give an instruction submitting an issue as to a particular item of damages, if any was found by the jury, when there was no competent evidence thereof, although the practice of submitting an issue upon which there is no evidence is not commendable. *Reeks v. Seattle Electric Co.* 609

DANGEROUS MACHINERY AND APPLIANCES:

See MASTER AND SERVANT.

DEATH:

Review of verdict as to cause of death, see APPEAL AND ERROR, 16.

Liability of wife's separate estate for funeral expenses of husband, see HUSBAND AND WIFE, 1.

Wrongful death from sale of intoxicating liquors, see INTOXICATING LIQUORS, 3.

Action for death of employee, see MASTER AND SERVANT, 2, 12, 23-26.

DEBTOR AND CREDITOR:

Acceptance of note as suspension of action on account, see **ACTION**, 2.

DECEDENTS:

Testimony as to transactions with persons since deceased, see **WITNESSES**, 2.

DECISION:

Failure to except to instruction as law of case, see **APPEAL AND ERROR**, 23.

Rule of decision, see **COURTS**, 4.

On appeal in criminal prosecution, see **CRIMINAL LAW**, 13.

DECLARATIONS:

As evidence in civil actions, see **EVIDENCE**, 2.

DEDICATION:

By upland owner of plat covering shore lands, see **NAVIGABLE WATERS**, 14.

1. **DEDICATION — RESERVATIONS — CONSTRUCTION — FEE OF STREET — RIGHTS OF PURCHASER—NAVIGABLE WATERS.** The fact that the plat-tors in dedicating a street along the shore line of a lake, the center line of which was above high water mark, excepted and reserved to their own use, all water, riparian, and littoral rights, does not show an intent to reserve the fee to a thread of the street upon sale of lots abutting thereon, thereby saving a preference right to purchase the shore lands; nor does the fact that they believed they owned the lands below high water show an intent to reserve the fee to a thread of the street beyond its center line. *Gifford v. Horton*..... 595
2. **DEDICATION—BOUNDARIES — STREETS BORDERING ON LAKE — FEE — RIGHTS OF PURCHASERS.** Where a street in a plat is dedicated along a lake shore to the high water mark, the purchaser of lots abutting on the street acquires the fee to the entire street, subject to the public easement. *Gifford v. Horton*..... 595

DEEDS:

Alteration, see **ALTERATION OF INSTRUMENTS**.

. Cancellation, see **CANCELLATION OF INSTRUMENTS**.

Validity, construction and effect of covenants in deeds, see **COVENANTS**.

Failure of plaintiff's title through want of description in tax deed, see **EJECTMENT**, 1.

Between husband or wife, see **HUSBAND AND WIFE**, 3.

Water rights, see **WATERS AND WATER COURSES**, 18-21.

DEFAULT:

- Nonpayment of interest as notice of dishonor, see **BILLS AND NOTES**, 3.
- Election to declare debt due for default in payment of interest, see **BILLS AND NOTES**, 7.
- Vacation of default judgment for void or defective summons, see **JUDGMENT**, 1, 2, 4, 5.

DEFENSES:

- See **FORCIBLE ENTRY AND DETAINER**.
- Purchase of debatable title as defense in action to set aside void tax sale, see **QUIETING TITLE**, 3.
- In action to vacate tax judgment, see **TAXATION**, 13.

DEFICIENCY JUDGMENT:

- On foreclosure of chattel mortgage, see **CHATTEL MORTGAGES**, 1-3.

DELAY:

- Laches, see **EQUITY**.

DEMAND:

- For payment of bill or note, see **BILLS AND NOTES**, 7.
- Necessity for demand by plaintiff for allowance to complete contract in action for balance due, see **CONTRACTS**, 3.
- For trial by jury, see **JURY**, 1.

DENIALS:

- In pleading, see **PLEADING**, 1.

DEPOSITIONS:

1. **DEPOSITIONS — NOTICE — GIVING NAME OF WITNESS.** Under Bal. Code, § 6019, for the taking of the evidence of a "witness" by deposition, and requiring sufficient notice to enable a party to attend and "three days for preparation," the notice must state the name of the witness to be examined, that being within the spirit if not the letter of the law. *Donaldson v. Winningham*..... 19

DESCRIPTION:

- Of mining claims, see **MINES AND MINERALS**, 2, 3.

DIRECTING VERDICT:

- In civil actions, see **TRIAL**, 3.

DISBARMENT:

- Of attorney, see **ATTORNEY AND CLIENT**, 1.

DISCHARGE:

- Discharge in criminal case as bar to subsequent prosecution, see **CRIMINAL LAW**, 4.
- Of jury on motion for direction of verdict, see **TRIAL**, 3.

DISCRETION OF COURT:

- To consolidate actions, see ACTION, 1.
- Review in civil actions, see APPEAL AND ERROR, 13.
- To grant continuance, see CONTINUANCE.
- Discharge of jury, see CRIMINAL LAW, 4.
- In opening default judgment, see JUDGMENT, 5.
- New trial, see NEW TRIAL, 4.
- Order of proof, see TRIAL, 1.

DISCRIMINATION:

- Special privileges or immunities and class legislation, see CONSTITUTIONAL LAW.

DISMISSAL AND NONSUIT:

- Dismissal on appeal or writ of error, see APPEAL AND ERROR, 2.
- Dismissal of complaint as bar to second prosecution, see CRIMINAL LAW, 2, 3.
- Necessity for findings to support judgment of, see TRIAL, 8.

DISTRICT AND PROSECUTING ATTORNEYS:

- Authority of commissioners to dismiss appeal taken by prosecuting attorney, see COUNTIES, 1.

DIVERSION:

- Of water course, see WATERS AND WATER COURSES, 13, 14.

DIVORCE:

1. DIVORCE—DECREE—VACATION—DURESS. The courts have jurisdiction to vacate a decree of divorce for fraud in obtaining it, and a wife is entitled to the vacation of a decree, where she moved therefor within one month, and it appears that she was induced to enter a general denial and make no contest through the duress of threats by the husband to commit suicide, which were false and made to conceal his intention to marry another, and which affected her health and nervous system, she having a meritorious defense to the action. *Graham v. Graham*..... 70

DOCTORS:

- See PHYSICIANS AND SURGEONS.

DRAINS:

- Grant of right of way for water ditch, see WATERS AND WATER COURSES, 18-20.

DURESS:

- As ground for vacation of divorce decree, see DIVORCE.

DYNAMITE:

- See EXPLOSIVES, 1.

EARNINGS:

Measure of damages for impairment of earning capacity, see **DAMAGES**, 2.

EASEMENTS:

Licenses in respect to real property, see **LICENSES**.

In water course, see **WATERS AND WATER COURSES**, 18, 20.

EJECTMENT:

Recovery of mineral lands, see **MINES AND MINERALS**, 5.

Rights of upland owner to damages for use of tide land, see **NAVIGABLE WATERS**, 12.

1. **EJECTMENT—TAXATION—DEED—FAILURE TO DESCRIBE PROPERTY—PLAINTIFF'S TITLE.** As plaintiffs in ejectment relying on a tax title must recover on the strength of their own title, their actions must fall where the proof shows that the tax deed as filed with the county auditor and adopted as part of the records in his office did not include, or in any manner refer to, the premises in controversy, a description of which was interlined by some unknown person subsequent to its execution and filing. *Stockand v. Hall*..... 106
2. **EJECTMENT—DAMAGES—INCIDENTAL TORTS—PLEADING.** In an action by an upland owner against a boom company to recover possession of the land and the rents, issues, and profits during the detention, the plaintiffs are not entitled to damages for cutting off their ingress and egress from the water, or incidental tortious acts, especially where the acts causing such damage are not pleaded. *Lownsdale v. Grays Harbor Boom Co.*..... 542
3. **EJECTMENT—DAMAGES—INJURY TO LAND.** Where injury was done by converting plaintiffs' land into a channel of a river, it is immaterial, as far as concerns the damages recoverable in ejectment, whether the channel was navigable or not. *Lownsdale v. Grays Harbor Boom Co.*..... 542
4. **EJECTMENT—DAMAGES—USE OF LANDS.** In ejectment against a boom company for uplands and shore lands along navigable waters, the value of the lands as a boom site cannot be considered in determining the damages for detention. *Lownsdale v. Grays Harbor Boom Co.* 542
5. **EJECTMENT—BETTERMENTS—TAXATION—REDEMPTION—STATUTES.** In an action to recover land sold under a void tax judgment, the defendants can recover for improvements made upon the land since the enactment of the betterment law of 1903, but not for those made prior thereto. *Gould v. White*..... 394

ELECTION OF REMEDIES:

Option to declare debt due for default in payment of interest, see **BILLS AND NOTES**, 7.

ELECTIONS:

Submission of question of issuing municipal bonds, see **MUNICIPAL CORPORATIONS**, 8.

EMERGENCIES:

Acts in emergencies by persons injured at railroad crossings, see **RAILROADS**.

EMINENT DOMAIN:

Right to damages for condemnation of uplands as raising Federal question, see **COURTS**, 4.

Waiver of right to jury trial, see **JURY**, 1.

1. **EMINENT DOMAIN—RAILROADS—POWER TO CONDEMN—PUBLIC SERVICE—EXTENT—GOOD FAITH.** A railway terminal company organized primarily to connect business enterprises of a city with terminals of a railroad company in another city, by means of tracks and car ferries, and to carry freight in car load lots between such points, is a railroad company entitled to condemn land, where it has shown its good faith by expending \$100,000, and has under contract equipment that will cost \$400,000 additional for barges, car floats, and terminals, although it owns no rolling stock. *State ex rel. Milwaukee Terminal R. Co. v. Superior Court*..... 365
2. **EMINENT DOMAIN—NECESSITY—OBJECTIONS—CROSSING ABUTTING HARBOR AREA.** It is not a valid objection to the necessity of a railroad company's condemnation of tide lands, that it must first cross the abutting harbor area and that the constitution and laws prohibit the acquisition of harbor area by condemnation, since the state may lease for thirty years the right to construct a railroad on the harbor area. *State ex rel. Hulme v. Grays Harbor and Puget Sound R. Co.* 530
3. **SAME—PUBLIC USE—PRIOR USE BY RAILROAD—LAND LEASED TO PATRON.** Strips of land owned by a railroad company, fifteen feet wide, adjacent to a street in which the railroad company has its railroad tracks, are not devoted to a public use so as to exempt them from condemnation for a public use by another railroad company, where it appears that they had never been used for railroad tracks but were in possession of a mill company under leases for nominal rent or rent free, and were used by the mill for loading platforms, although such use was a convenience to the mill as a patron of the owning railroad company; the test being the use to which the property is applied as a matter of right, and not the ownership. *State ex rel. Milwaukee Terminal R. Co. v. Superior Court* 365
4. **SAME—NECESSITY—REASONABLENESS.** In such a case, the question of the reasonable necessity requisite to authorize condemnation does not depend on the fact that other property might be appropriated for the purposes of the relator, nor on the fact that it would

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- increase the cost to the mill company of loading cars and result in a loss of business to the defendant railway company, especially where the defendant has other property that can be used for loading platforms, as these are questions largely of expediency; it appearing that the route of relator's spur track is the most feasible one and reasonably necessary. *State ex rel. Milwaukee Terminal R. Co. v. Superior Court* 365
5. EMINENT DOMAIN—NECESSITY FOR STREETS — DETERMINATION BY CITY COUNCIL. The city council is the proper authority for deciding the necessity of condemning land for a public street. *Seattle v. Byers* 518
6. SAME—CONDEMNATION FOR STREETS—PUBLIC USE. When the city council has determined by ordinance that the taking of certain property is necessary for the purposes of a public street, and directed its condemnation, the court must find that the taking is for a public use, although Const., art 1, § 16, makes the question a judicial question only. *Seattle v. Byers*..... 518
7. SAME—SHORE LANDS—DAMAGE BY LAWFUL MAINTENANCE OF BOOM. In condemnation for a boom site, the owners are entitled to compensation for the land taken and added inconveniences in getting to the navigable channel, and for damages by reason of erosions necessarily caused by the proper and lawful maintenance of the boom, and the changed use of the stream. *Grays Harbor Boom Co. v. Lounsdale* 83
8. EMINENT DOMAIN — DAMAGES — TIDE LANDS — TITLE — RIGHT TO LEASE HARBOR AREA. The owner of tide lands, appropriated by a railroad company, having the preference right to lease the abutting harbor area, is entitled to recover as damages the value of the land taken at the time of the trial and damages to the part not taken, plus the value of the statutory right to lease abutting harbor area; and it is immaterial that the title to the tide land was not acquired from the state until after the condemnation suit was commenced, it having been previously applied for. *State ex rel. Hulme v. Grays Harbor and Puget Sound R. Co.*..... 530
9. EMINENT DOMAIN—DAMAGES—PROBABLE VALUE OF SHORE LANDS. To recover, in condemnation of shore lands, for the contemplated use of the lands as a mill site, the use must be shown to be available, and that means a possible use not dependent on the abandonment of the use of adjoining lands of another, or upon remote, uncertain or speculative contingencies. *Grays Harbor Boom Co. v. Lounsdale* 83
10. EMINENT DOMAIN—RIPARIAN RIGHTS—TIDE LANDS—DAMAGES. In condemnation proceedings of lands and shore rights for a boom site, a riparian owner is not entitled to damages for the probable value

EMINENT DOMAIN—CONTINUED.

of his land for a mill site or for commercial purposes depending in any degree on the use of the tide lands embraced in the boom site. *Grays Harbor Boom Co. v. Lownsdale*..... 83

11. EMINENT DOMAIN—DAMAGES—WATER COURSES—RIPARIAN RIGHTS—VALUE OF SHORE AS BOOM SITE. In condemnation proceedings by a boom company to condemn riparian rights of owners on the bank of a stream in which the tide ebbs and flows, the owners are not entitled to have the damages assessed with reference to the value of the property as a boom site; since the right to maintain a boom is not appurtenant to the uplands, the tide lands belong to the state, and the boom site may be granted by the state without reference to riparian ownership. *Grays Harbor Boom Co. v. Lownsdale*..... 83
12. SAME—WAIVER OF PROOF. Walver of proof of incorporation and payment of a corporate license fee does not waive proof of the subscription to the capital stock of the petitioner. *State ex rel. Hulme v. Grays Harbor and Puget Sound R. Co.*..... 530
13. SAME—WAIVER OF CONDITION—PLEA IN ABATEMENT. The provision of Bal. Code, § 4250, that no railroad company shall institute proceedings to condemn land until the whole of its capital stock is subscribed, is a rule of public policy, and is not waived by the landowner's failure to raise it by plea in abatement. *State ex rel. Hulme v. Grays Harbor and Puget Sound R. Co.*..... 530
14. EMINENT DOMAIN—CONDITION PRECEDENT—SUBSCRIPTION OF CAPITAL STOCK—PLEADING. An allegation of the incorporation of a railroad company seeking to condemn land is not a compliance with Bal. Code, § 4250, providing that no railroad company shall institute such proceedings until the whole amount of the capital stock is subscribed, as that condition is not essential to incorporation. *State ex rel. Hulme v. Grays Harbor and Puget Sound R. Co.*..... 530
15. EMINENT DOMAIN—CONDITIONS PRECEDENT—RIGHT TO BRIDGE STREAM—NAVIGATION. The consent of the secretary of war to construct a bridge over a navigable stream is not a condition precedent to condemnation of tide lands to be reached by way of the bridge, inasmuch as the state has given its consent by Bal. Code, §§ 4336, 4307, providing that bridges across navigable streams shall be so constructed as not to interfere with or obstruct navigation. *State ex rel. Hulme v. Grays Harbor and Puget Sound R. Co.*..... 530
16. SAME—DAMAGES—EVIDENCE—RE MOTENESS. In condemnation proceedings of a strip of land between a street and a *cul de sac*, evidence of the value which the land would have if the *cul de sac* should be vacated in the future, is inadmissible on the subject of damages, being too remote and speculative. *Seattle v. Byers*..... 518
17. EMINENT DOMAIN—DAMAGES—EVIDENCE OF VALUE—MEASURE. In determining the damages in condemnation proceedings, evidence of the price paid for the land more than fifteen years ago is inadmis-

EMINENT DOMAIN—CONTINUED.

- suble; the present value and the diminution by reason of the proposed appropriation being the true basis. *Grays Harbor Boom Co. v. Lownsdale* 83
18. **SAME—TRIAL—DAMAGES.** A verdict on the question of damages in a condemnation proceeding is not conclusive as to the amount of damages, if there was error in injecting into the case an improper element of damages. *Grays Harbor Boom Co. v. Lownsdale*..... 83
19. **EMINENT DOMAIN—PROCEEDINGS—APPEAL—DECISIONS APPEALABLE.** An order adjudging a public use and necessity in condemnation proceedings, brought by a city under Laws 1907, p. 316, is reviewable on appeal from the final judgment, and therefore is not appealable prior thereto; since Bal. Code, § 6500, subd. 1, authorizes the review, on appeal from the final judgment, of any order made before judgment, and Laws 1907, p. 316, § 51, provides for appeals in condemnations as in other civil actions. *Tacoma v. Nisqually Power Co.*..... 292
20. **EMINENT DOMAIN—AWARD OF DAMAGES—APPEAL—REVIEW.** Upon appeal from an award of damages in a condemnation proceeding, only errors going to the propriety or justness of the award can be reviewed. *Fruitland Irrigation Co. v. Smith*..... 185
21. **EMINENT DOMAIN — PREPAYMENT OF DAMAGES — APPEAL—COSTS—AGAINST LANDOWNER.** Under the constitutional provision prohibiting the taking of private property without just compensation being first made or paid into court, costs of an appeal, successfully prosecuted by the petitioner from an award of damages, cannot be taxed against the landowner, on remanding the case for a retrial to determine the proper damages; since the petitioner must pay all costs of the proceedings to ascertain the damages. *Grays Harbor Boom Co. v. Lownsdale* 83

EMPLOYEES:

See MASTER AND SERVANT.

EQUITY:

See CANCELLATION OF INSTRUMENTS; SPECIFIC PERFORMANCE.

Joinder of equitable actions, see ACTION, 1.

Determination of adverse claims to real property, see QUIETING TITLE.

1. **EQUITY — LACHES — LIMITATION OF ACTIONS.** Laches cannot be claimed in the bringing of an action to set aside a tax judgment, where nothing was shown except the lapse of time, and the statute of limitations had not run against the action. *Cordiner v. Finch Investment Co.* 574

ESTABLISHMENT:

Of courts, see COURTS, 1-3.

Of shore line of lake and rights of littoral owner, see PUBLIC LANDS, 5.

ESTATES:

Estates of deceased persons, see **EXECUTORS AND ADMINISTRATORS**.

ESTIMATES:

Insufficient estimate of cost of improvement as affecting assessment, see **MUNICIPAL CORPORATIONS**, 2.

ESTOPPEL:

Right to raise question for first time on appeal, see **APPEAL AND ERROR**, 3-7.

To deny assignee of stock not stockholder, see **CORPORATIONS**, 1.

By judgment, see **JUDGMENT**, 7, 8.

To assert ownership and exemption of property from mortgage, see **CHATTEL MORTGAGES**, 4.

Stipulation submitting actions on merits as affecting estoppel to assert legal conclusions from pleadings, see **STIPULATIONS**.

Of right to re-divert waters into other channel, see **WATERS AND WATER COURSES**, 13.

1. **ESTOPPEL—MATTER IN PAIS.** The use of water under a parol license, which was revoked before any prescriptive rights could ripen, does not obtain rights in the realty by estoppel *in pais*. *Rhoades v. Barnes* 145
2. **ESTOPPEL—RETENTION OF CHECK.** The retention for a few days of a check given as payment in full to attorneys upon the client's statement of the case, until the attorneys could ascertain the nature of the settlement, will not estop them from bringing action for a larger sum due them on their contract of employment by reason of the nature of the settlement. *Cain v. Moore*..... 627

EVIDENCE:

Alteration of instruments, see **ALTERATION OF INSTRUMENTS**.

Matters judicially noticed on appeal, see **APPEAL AND ERROR**, 12.

Prejudice from error on appeal, see **APPEAL AND ERROR**, 17-19.

For attorney's fee, see **ATTORNEY AND CLIENT**, 2, 4.

On bill or note, see **BILLS AND NOTES**, 8-10.

For injuries from defects in bridges, see **BRIDGES**.

Fraud of broker in sale of property, see **BROKERS**.

In suit for cancellation of instruments, see **CANCELLATION OF INSTRUMENTS**.

For injuries to passengers, see **CARRIERS**, 3, 4.

To show conspiracy to create monopoly in sale of milk, see **CONSPIRACY**, 2, 3.

Breach of contract, see **CONTRACTS**, 4.

To enforce stockholders' liability for corporate debts, see **CORPORATIONS**, 2.

Record of commissioners as evidence of rejection of claim against county, see **COUNTIES**, 3.

EVIDENCE—CONTINUED.

Reputation of accused in prosecution for rape, see CRIMINAL LAW, 5.
 Comment on by judge in criminal prosecution, see CRIMINAL LAW, 8.
 To identify habitual criminal, see CRIMINAL LAW, 15-17.

Depositions, see DEPOSITIONS.

In ejectment, see EJECTMENT, 1, 4.

Value of property in condemnation proceedings, see EMINENT DOMAIN, 16, 17.

Separate property of married woman, see HUSBAND AND WIFE, 2, 3.

Necessity for corroborating testimony of prosecuting witness, see INCEST.

In action for wrongful death from sale of liquors, see INTOXICATING LIQUORS, 3.

To overcome recitals as to due service of process, see JUDGMENT, 1, 2.
 For injuries to servant in general, see MASTER AND SERVANT, 5, 10, 20-26.

To show navigability of stream, see NAVIGABLE WATERS, 5.

Of jurors on motion for new trial, see NEW TRIAL, 3.

To show *prima facie* case of practicing without license, see PHYSICIANS AND SURGEONS, 2.

Negligence causing injuries to persons at crossings, see RAILROADS.

Of fraud in sale of horse, see SALES, 1.

Of part performance entitling specific performance of contract, see SPECIFIC PERFORMANCE, 1.

Of trespass in cutting standing timber, see TRESPASS, 1.

Reception at trial, see TRIAL, 1.

To overcome presumption of gift arising from conveyance to husband, see TRUSTS.

Of laches and negligence barring right to rescission by vendor, see VENDOR AND PURCHASER, 2.

Of intent to abandon use of waters, see WATERS AND WATER COURSES, 4.

Admissibility of evidence as to transactions with decedent, see WITNESSES, 2.

1. EVIDENCE—JUDICIAL NOTICE—RECORD IN ANOTHER CAUSE. The court cannot take judicial notice of the record in another cause, even between the same parties in the same court, when not pleaded or proved. *Lownsdale v. Grays Harbor Boom Co.*..... 542
2. EVIDENCE—DECLARATION RES GESTÆ. In an action for personal injuries sustained at a railroad crossing, the rejection of evidence of declarations of the train crew, offered as part of the *res gestæ*, is discretionary. *Grant v. Oregon R. & Nav. Co.*..... 678
3. EVIDENCE—PAROL EVIDENCE TO VARY WRITING—CONTRACTS. A written contract for the sale of goods on consignment providing the compensation for the services of the consignee shall be the excess of the selling price over the prices fixed by the consignor, cannot be varied by parol evidence that the consignors agreed to fix a price

EVIDENCE—CONTINUED.

ten per cent less than the regular list price; when the course of dealing showed that such oral agreement had not been omitted from the written contract by inadvertence or mistake. *Passow & Sons v. Kirkwood Distillery Co.*..... 196

4. SAME. A contract for the sale on consignment of such goods as the consignors shall see fit to send to the consignee at Spokane, Washington, cannot be varied by parol evidence that the consignees were to have the exclusive agency for the sale of the consignor's goods in the states of Idaho and Washington. *Passow & Sons v. Kirkwood Distillery Co.* 196
5. SAME. Where a bill of goods was ordered prior to the parties' entering into a written contract to sell goods on consignment, but was not delivered until thereafter, oral evidence that the parties agreed that the bill be paid for under the terms of the contract does not vary the terms of the contract, and is admissible. *Passow & Sons v. Kirkwood Distillery Co.*..... 196
6. EVIDENCE — CONTRACTS — AMBIGUITY — EXTRANEOUS EVIDENCE. A contract to pay attorneys ten per cent of any sum collected "in case of a compromise" and not to exceed \$200 "in case of a settlement by sale or exchange of stock," is not so ambiguous as to admit of explanation by what the client said at the time such clause was added as an amendment to the original contract. *Cain v. Moore*..... 627

EXCAVATIONS:

Injuries to servant engaged in digging pit, see MASTER AND SERVANT, 28.

EXCEPTIONS, BILL OF:

Necessity for exceptions for purpose of review, see APPEAL AND ERROR, 5-7, 10, 23.

EXCESSIVE DAMAGES:

See DAMAGES, 4, 5.

EXCUSE:

For nonperformance of contract, see CONTRACTS, 2.

EXECUTION:

Cessation of controversy on appeal from order enjoining sale, see APPEAL AND ERROR, 1.

Necessity for wife signing chattel mortgage on exempt personal property, see HUSBAND AND WIFE, 4.

Against wife's separate property for separate debt of husband, see HUSBAND AND WIFE, 5.

Waiver of exemption from by husband's mortgage of personal property, see HUSBAND AND WIFE, 4.

EXECUTION—CONTINUED.

Quieting title against execution sale, see **QUIETING TITLE**, 4.

Sufficiency of title to act relating to sales under execution, see **STATUTES**, 1.

1. **EXECUTION—ISSUANCE—JUDGMENT IN ANOTHER COUNTY—SALE—VALIDITY.** Execution cannot be issued by the superior court of one county upon the transcript of a judgment rendered by the superior court of another county, and any sale under such an execution would be void. *Bramel v. Ratliff*..... 581
2. **EXECUTION—LEVY—HOW MADE—PERSONAL PROPERTY—GROWING CROPS.** Under Bal. Code, §§ 5269, 5362, requiring personal property capable of manual delivery to be levied upon by taking it into custody, a levy upon a growing crop of wheat made by posting notices of sale and delivering a copy of the execution and notices to the judgment debtors, is not valid as to subsequent purchasers from the debtors. *Cupples v. Level*..... 299
3. **EXECUTION—SALES—BONA FIDE PURCHASERS.** The purchaser of a sheriff's certificate of sale under execution is not a *bona fide* purchaser as to defects in process on which the judgment was founded. *Hays v. Peavey*..... 78
4. **EXECUTION—SUPPLEMENTAL PROCEEDINGS—ORDER.** In supplemental proceedings, where money is disclosed applicable to the judgment, it is not prejudicial error that the order required its payment to the clerk of court rather than to the sheriff. *Belknap v. Platter*.... 1

EXECUTORS AND ADMINISTRATORS:

Effect of administrator's sale of insured property, see **INSURANCE**, 2.
 Restraining issuance of letters of administration, see **PROHIBITION**, 1.

1. **EXECUTORS AND ADMINISTRATORS—LETTERS OF ADMINISTRATION—PREREQUISITES—INTESTACY—JURISDICTION—COMMUNITY PROPERTY.** The power to grant letters of administration being purely statutory, intestacy is a necessary prerequisite to the granting of general letters of administration in this state, under Bal. Code, §§ 6141, 6142, authorizing administration upon the estates of intestates and requiring the application to show that the deceased left no will; hence the superior court is without jurisdiction to grant letters of administration to the wife upon the community property, after appointing executors and admitting to probate the will of her deceased husband, devising and bequeathing his half interest in the community property and his separate estate, and naming his executors. *In re Guye's Estate* 264
2. **SAME—WILLS—HUSBAND AND WIFE—COMMUNITY PROPERTY—POWER TO NAME EXECUTOR.** Under Bal. Code, §§ 4490 and 4621, making one-half of the community property subject to the testamentary disposition of each spouse, the testator has the power to name the

EXECUTORS AND ADMINISTRATORS—CONTINUED.

executor to administer the estate, which necessarily carries with it the administration of all community property for such length of time as necessary to pay debts and speedily close the estate. *In re Guye's Estate* 264

EXEMPTIONS:

Waiver by husband's chattel mortgage of community property, see **HUSBAND AND WIFE, 4.**

EXPLOSIVES:

1. **EXPLOSIVES—DANGEROUS WORK—ASSIGNMENT OF CONTRACT FOR STREET GRADING—LIABILITY FOR ACTS OF INDEPENDENT CONTRACTOR.** The original contractor for the grading of a public street, who had assigned the contract to an independent contractor using his own methods free from control except as to the results obtained, is not liable for damages caused by a dynamite explosion in the prosecution of the work, where it is not shown that the use of dynamite was contemplated in the contract or customary in improvements of like character; since the grading of a street in such a case is not so inherently dangerous as to come within the exception to the rule of nonliability for the acts of independent contractors. *Seattle Lighting Co. v. Hawley* 137
2. **EXPLOSIVES—CONTRIBUTORY NEGLIGENCE—INTOXICATION OF VENDEE—INSTRUCTIONS.** Upon the defense of contributory negligence, in an action for injuries caused by the explosion of a dangerous chemical sold by the defendant, and where there was evidence that the plaintiff had been drinking prior to the accident, it is proper to instruct that the plaintiff could not recover if the jury find that he was intoxicated and thereby prevented from using his senses and knowledge and that in consequence he was injured, when he would not have been if sober or in the exercise of reasonable care. *Conrad v. Graham & Co.* 641
3. **SAME—SALE OF EXPLOSIVES—NOTICE.** In an action for personal injuries caused by the explosion of a chemical sold by defendant to plaintiff, notice to plaintiff's messenger, to whom the same was delivered, that the chemical was of a more dangerous kind than the one ordered, is notice to the plaintiff. *Conrad v. Graham & Co.* 641
4. **SAME—CONTRIBUTORY NEGLIGENCE—NOTICE—WARNING.** Where plaintiff was experienced in the use of flashlights and knew that only magnesium could be used in a magazine lamp, defendant is not liable for injuries caused by an explosion of another kind of chemical, sold to plaintiff, and which he attempted to use in his lamp, if defendant gave plaintiff's messenger notice that the chemical was more dangerous than magnesium, and plaintiff, by the exercise of reasonable care, would have seen and read cautions on the package against the use of such chemical in a magazine lamp. *Conrad v. Graham & Co.* 641

EXTRINSIC EVIDENCE:

See EVIDENCE, 3-6.

FACTORS:

Refusal to return goods held on consignment as conversion, see TROVER AND CONVERSION.

1. FACTORS—SALES ON COMMISSION—CONTRACT—CONSTRUCTION. Under a contract for the sale of defendant's goods on commission, which fixed the plaintiff's compensation at a certain sum for every case "actually sold, delivered and paid for," nothing to be paid until the money shall be received by the defendant from the purchasers, the plaintiff was not entitled to commissions on orders taken and not filled at the time of the termination of the agreement. *West Coast Manufacturers' Agency v. Oregon Condensed Milk Co.*..... 247

FACTORY ACT:

Guarding dangerous machinery, see MASTER AND SERVANT, 6, 10, 12.

FALSE REPRESENTATIONS:

Fraud in sale of corporate stock, see FRAUD.

Affecting validity of sale of personalty, see SALES, 1.

Affecting validity of contract for sale of lands, see VENDOR AND PURCHASER, 1, 2, 5-7.

FEDERAL QUESTION:

In ruling on right to damages in condemnation of uplands, see COURTS, 4.

FELLOW SERVANTS:

See MASTER AND SERVANT, 9.

FILING:

Of claim with city for injuries to property, see MUNICIPAL CORPORATIONS, 10.

FINDINGS:

Review as dependent on exception in lower court, see APPEAL AND ERROR, 5-7.

Effect of insufficient findings in trial without jury, see APPEAL AND ERROR, 14.

Necessity of to support judgment of nonsuit, see TRIAL, 8.

FIRE INSURANCE:

See INSURANCE, 2, 3.

FORCIBLE ENTRY AND DETAINER:

Supersedeas and stay of proceedings on appeal, see **APPEAL AND ERROR**, 9.

1. **FORCIBLE ENTRY AND DETAINER—EQUITABLE DEFENSES.** In forcible entry and detainer, where defendant admits the lease, default, and notice to quit, equitable defenses, offsets, and counterclaims are not available. *Hutchinson v. Wilson*..... 410
2. **SAME—FRAUD—EFFECT OF ADMITTING COMPLAINT.** In forcible entry and detainer, the defendant cannot interpose, as a legal defense, the fact that the lease was void for fraud, entitling him to retain possession until reimbursed for his losses. *Hutchinson v. Wilson* 410
3. **SAME—SURRENDER OF PREMISES TO THIRD PERSON.** In forcible entry and detainer, the defendant cannot change the action to one of debt by surrendering the premises to a third person after the commencement of the action. *Hutchinson v. Wilson*..... 410

FORECLOSURE:

Of mortgage, see **CHATTEL MORTGAGES**.

FORFEITURE:

Waiver of forfeiture clause in bond, see **BILLS AND NOTES**, 1.

Of insurance, see **INSURANCE**.

Of contract for nonpayment of purchase price, see **VENDOR AND PURCHASER** 3

FORMER ADJUDICATION:

See **JUDGMENT**, 7, 8.

FORMER JEOPARDY:

Bar to prosecution, see **CRIMINAL LAW**, 4.

FRANCHISE:

Extent and boundaries of municipal franchise to gas company, see **GAS**.

FRAUD:

Necessity of pleading in action by attorney for services, see **ATTORNEY AND CLIENT**, 3.

As affecting validity of negotiable instruments, see **BILLS AND NOTES**, 8-10.

By brokers, see **BROKERS**.

As ground for cancellation of instruments, see **CANCELLATION OF INSTRUMENTS**.

As ground for vacation of divorce, see **DIVORCE**.

Admitting complaint as waiver of right to defense of fraud, see **FORCIBLE ENTRY AND DETAINER**, 2.

FRAUD—CONTINUED.

In application for life insurance, see **INSURANCE**, 1.

Agent's knowledge as binding principal, see **PRINCIPAL AND AGENT**.

In sale of personality, see **SALES**, 1.

Of vendor avoiding contract of sale of land, see **VENDOR AND PURCHASER**, 1, 2, 5-7.

1. FRAUD—IN SALE OF STOCK—PLEADINGS—COMPLAINT—SUFFICIENCY.

A complaint states a cause of action for fraud in the sale of shares of corporate stock in that the vendor falsely represented that the corporation was not indebted on certain promissory notes, without alleging that the plaintiffs had paid the notes, or without alleging the value of the stock, or stating in so many words, that it was of less value by reason of liability on the notes. *Mills v. Knudson* 614

2. SAME—MEASURE OF DAMAGES.

The measure of damages for falsely representing, on the sale of one-half of the stock of a corporation, that it was not indebted, would be one-half of the amount of the indebtedness. *Mills v. Knudson*..... 614

FRAUDS, STATUTE OF:

License within statute of frauds, see **LICENSES**.

Specific performance of contracts partly performed, see **SPECIFIC PERFORMANCE**, 1.

1. FRAUDS, STATUTE OF—SALE OF REAL ESTATE—MEMORANDUM—SUFFICIENCY—CONTRACT FOR COMMISSIONS—BROKERS.

The words "Commission to be paid when 2d payment is made to M. & M., \$625," after the signature of a vendor at the foot of a contract to purchase real estate, is not a sufficient memorandum of the agreement, within Laws 1905, p. 110, providing that an agreement for a broker's commission on the sale of real estate shall be void unless the contract or some note or memorandum thereof shall be in writing, and signed by the party to be charged therewith, or some person thereunto by him lawfully authorized (overruling, on rehearing, *Id.*, 50 Wash. 495). *McCrea v. Ogden*..... 521

2. FRAUDS, STATUTE OF—BROKERS—EMPLOYMENT—MEMORANDUM.

An agreement with brokers whereby the owner of premises offered to take a fixed sum for his property, the brokers to have all that they could get over that sum, is within the statute of frauds, Laws 1905, p. 110, requiring agreements employing an agent to sell real estate for compensation to be in writing. *Broderius v. Anderson*..... 591

FRAUDULENT CONVEYANCES:

Conveyances induced through fraud and undue influence, see **CANCELLATION OF INSTRUMENTS**.

FUNERAL EXPENSES:

Liability of wife's separate estate for, see **HUSBAND AND WIFE**, 1.

GAMBLING:

Prosecution for keeping gambling resort, see **GAMING**.

GAMING:

1. **GAMING—INFORMATION—PLAYING FOR GAIN—SUFFICIENCY.** A complaint or information for gambling under Bal. Code, § 7260 is insufficient to support a conviction where it fails to allege that the game was played "for money, checks, credits, or any other representative of value." *State v. Burns*..... 113
2. **GAMING—KEEPING GAMBLING RESORT—INFORMATION—SUFFICIENCY.** A complaint or information for gambling, under the act of 1903, p. 63, is insufficient to support a conviction, where it fails to allege the commission of the crime in a place "where persons resort for the purpose of playing," etc., the statute clearly being intended to prohibit the maintaining of gambling resorts. *State v. Burns*.. 113

GARNISHMENT:

Defendant as prevailing party on appeal, see **APPEAL AND ERROR**, 8.

GAS:

1. **GAS—FRANCHISES—EXTENT—"ANY ADDITIONS" TO A CITY.** A franchise to lay gas pipes throughout the city and throughout any addition thereto, and as the boundaries thereof are or may hereafter be, embraces territory thereafter included in the city, and is not intended to be restricted to platted portions' and other large areas not platted but within the then limits of the city. *Seattle Lighting Co. v. Seattle* 9
2. **SAME—MUNICIPAL CORPORATIONS—TERRITORY INCLUDED.** Such a franchise is not void as granting rights outside the city limits. *Seattle Lighting Co. v. Seattle*..... 9

GIFTS:

Between husband and wife, see **HUSBAND AND WIFE**, 3.

Presumption of gift by wife's conveyance to husband, see **TRUSTS**.

GOOD FAITH:

Of purchaser, see **BILLS AND NOTES**, 3, 8.

In proceedings to condemn property for railroad use, see **EMINENT DOMAIN**, 1.

GRANTS:

Limits and extent of municipal franchise to gas company, see **GAS**.

Of land under navigable streams, see **NAVIGABLE WATERS**, 8.

Of public lands, see **PUBLIC LANDS**, 1.

Water rights, see **WATERS AND WATER COURSES**, 18-21.

HABITUAL CRIMINALS:

See **CRIMINAL LAW**, 14-17.

HARBOR AREA:

Crossing of and condemnation of abutting tide lands, see **EMINENT DOMAIN**, 2, 8, 15.

Lease by state to railroad company, see **NAVIGABLE WATERS**, 9.

HARMLESS ERROR:

In civil actions, see **APPEAL AND ERROR**, 17-22.

In criminal prosecutions, see **CRIMINAL LAW**, 16.

HIGHWAYS:

Navigable waters as public highways, see **NAVIGABLE WATERS**.

Accidents at railroad crossings, see **RAILROADS**.

1. **HIGHWAYS—NEGLIGENCE—PREMISES—INVITATION TO USE—RIGHT TO THE LAND—WAY AROUND OBSTRUCTIONS.** One who obstructs a public road, and builds a road around the obstruction upon the lands of another, thereby invites the public to travel thereon; and he is not relieved from liability for negligence in failing to provide a reasonably safe way by the fact that he had no right on the land, and that travelers thereon would be trespassers. *Collins v. Hazel Lum-ber Co.* 524

HUSBAND AND WIFE:

Divorce and judicial separation, see **DIVORCE**.

Right to appointment as administrator of estate of deceased spouse, see **EXECUTORS AND ADMINISTRATORS**.

Parties defendant in action to foreclose against community prop-erty, see **TAXATION**, 12.

Presumption of gift by wife's conveyance to husband, see **TRUSTS**.

Competency as witnesses, see **WITNESSES**.

1. **HUSBAND AND WIFE—WIFE'S SEPARATE ESTATE—FUNERAL EX-PENSES.** The wife's separate estate is liable for the funeral expenses of her husband, he having left no property, where the services were rendered with her knowledge and consent. *Butterworth & Sons v. Teale* 14
2. **HUSBAND AND WIFE—COMMUNITY PROPERTY—PRESUMPTION—DE-GREE OF EVIDENCE.** The presumption that property acquired by pur-chase by the wife during marriage is community property can only be overcome by clear and satisfactory evidence. *Denny v. Schwa-bacher* 689
3. **HUSBAND AND WIFE—COMMUNITY PROPERTY—TRUSTS—GIFTS—PRE-SUMPTION—EVIDENCE TO OVERCOME.** Real estate, conveyed to the hus-band, is sufficiently shown to be the separate property of the wife and held in trust for her, so that it would not be subject to a sub-

HUSBAND AND WIFE—CONTINUED.

sequent judgment recovered against the husband, where it appears that, at the time the property was purchased, the wife was possessed of separate real and personal property of considerable value, that she paid for the property by giving her personal check and satisfying a loan she had made derived from her separate estate, and from the same source paid for improvements on the property, and the husband admitted the trusteeship, no credit was given him by virtue of his holding the title, and the property was conveyed before execution sale. *Denny v. Schwabacher*..... 689

4. HUSBAND AND WIFE—COMMUNITY PROPERTY—EXEMPTIONS—CHATTEL MORTGAGES. A chattel mortgage by a husband upon exempt personal property is valid without being signed by the wife, and a waiver of the exemption. *First National Bank of Wenatchee v. Fowler* 65

5. HUSBAND AND WIFE—SEPARATE DEBT OF HUSBAND—LIABILITY OF WIFE'S SEPARATE ESTATE. Judgment recovered in another state against the husband alone, on a contract relating to his separate estate, in an action wherein the wife appeared and her demurrer to the complaint was sustained, is the separate debt of the husband, and a judgment thereon in this state, against the husband alone, cannot be enforced against the wife's separate property. *Bramel v. Ratliff* 581

IMPEACHMENT:

Of verdict by testimony or affidavit of jurors, see CRIMINAL LAW, 7, 10.

Of verdict by affidavits of jurors on motion for new trial, see NEW TRIAL, 3.

IMPLIED REPEAL:

Of statute, see STATUTES, 2.

IMPROVEMENTS:

Allowance or recovery of compensation in ejectment, see EJECTMENT, 5.

Public improvements, see MUNICIPAL CORPORATIONS.

As part performance of oral contract to convey, see SPECIFIC PERFORMANCE, 1.

INCEST:

Instructions as to conviction for lesser offense, see CRIMINAL LAW, 9.

1. INCEST—EVIDENCE—CORROBORATION—NECESSITY. A conviction of incest may be had without corroboration of the testimony of the prosecuting witness, in the absence of any statutory requirement therefor. *State v. Aker*..... 342

INDEMNITY:

Contracts of suretyship, see **PRINCIPAL AND SURETY**.

INDEPENDENT CONTRACTORS:

Liability of assignee of contract for injuries from public improvement, see **MUNICIPAL CORPORATIONS**, 4-6.

INDICTMENT AND INFORMATION:

See **CONSPIRACY; ROBBERY**.

Dismissal as bar to another prosecution, see **CRIMINAL LAW**, 2, 3.

Indorsement of witnesses on information, see **CRIMINAL LAW**, 6.

Offenses against laws against gambling, see **GAMING**.

1. **INDICTMENT AND INFORMATION—STATUTORY LANGUAGE—ROBBERY.**
An information in the language of the statute is not sufficient in charging the crime of robbery or larceny from the person. *State v. Hall* 142
2. **INDICTMENT AND INFORMATION—CRIMINAL LAW—AIDER BY VERDICT.**
The doctrine of aider by verdict does not apply in a criminal case where the information was insufficient to sustain a conviction. *State v. Hall* 142

INDORSEMENT:

Of bill or promissory note, see **BILLS AND NOTES**, 5.

Of names of witnesses on information, see **CRIMINAL LAW**, 6.

INFORMATION:

Criminal accusation, see **INDICTMENT AND INFORMATION**.

INJUNCTION:

Review by appeal of order denying temporary injunction as bar to certiorari, see **CERTIORARI**, 1.

Obstruction of navigable stream, see **NAVIGABLE WATERS**, 3, 11.

INSTRUCTIONS:

Review of error in refusing as dependent on request in lower court, see **APPEAL AND ERROR**, 10.

Review as dependent on prejudicial nature of error, see **APPEAL AND ERROR**, 20-22.

In criminal prosecutions, see **CRIMINAL LAW**, 9.

In civil actions, see **TRIAL**, 4-7.

INSURANCE:

1. **INSURANCE—POLICY—APPLICATION—FALSE ANSWERS — OCCASIONAL USE OF LIQUORS.** Answers in an application for life insurance that the insured had no daily habit of drinking, that he drank occasionally, that he drank whiskey, and had always been in the habit of taking an occasional drink, are not shown to have been wilfully and

INSURANCE—CONTINUED.

intentionally false, so as to avoid liability on the policy, by evidence that at intervals he drank to excess and became intoxicated; there having been no representations made as to that point, although the medical examiner was instructed to make special investigation as to the occasional use of intoxicants. *Arts v. Mutual Life Insurance Co.* 269

2. **INSURANCE—POLICY—TRANSFER OF INTEREST—EXECUTORS AND ADMINISTRATORS—SALES—CONFIRMATION—TIME WHEN INTEREST PASSES.** An administrator's sale for cash, confirmed by the court, transfers the equitable title to the purchaser, although the deed is not delivered and no part of the purchase price is paid, Bal. Code, § 6274, providing that the sale shall be valid "from the time" of the confirmation; and hence a fire insurance policy providing that the policy shall be void if any change take place in the interest, title, or possession of the subject of the insurance, is vitiated by such sale and confirmation. *Moller v. Niagara Fire Insurance Co.* 439
3. **SAME—WAIVER BY AGENT.** A provision in a fire insurance policy rendering it void upon any transfer of interest cannot be waived by an agent where the change in interest occurred after issuance of the policy. *Moller v. Niagara Fire Insurance Co.* 439

INTEREST:

- Default in payment as notice of dishonor, see **BILLS AND NOTES**, 3.
- Option to declare debt due for default in payment, see **BILLS AND NOTES**, 7.
- Allowance to claimant after rejection of valid claim, see **COUNTIES**, 4.

INTERROGATORIES:

- In action for trespass in cutting standing timber, see **TRESPASS**, 4.

INTERVENTION:

- Parties entitled in action to enjoin issuance of bonds, see **MUNICIPAL CORPORATIONS**, 9.

INTESTACY:

- As prerequisite to granting letters of administration, see **EXECUTORS AND ADMINISTRATORS**.

INTOXICATING LIQUORS:

1. **INTOXICATING LIQUORS—SALE WITHOUT LICENSE—CLUBS—FURNISHING TO MEMBERS.** The serving of intoxicating liquors by a social club exclusively to its members, and not for profit, at a price fixed by the club, which is charged to the account of the members, is a sale within the meaning of an ordinance to regulate the sale of liquors and prohibiting their sale without first obtaining a license; since the matter of making a profit is immaterial and the principal object of the law is regulative. *Spokane v. Baughman* 315

INTOXICATING LIQUORS—CONTINUED.

2. **SAME—BARBOOMS—SOCIAL CLUBS.** The maintenance by a social club of a room wherein to furnish liquors to members to be drunk on the premises is the conducting of a barroom, within the meaning of an ordinance regulating the liquor business and barrooms, especially where the law makes drug stores the only exception. *Spokane v. Baughman* 315
3. **INTOXICATING LIQUORS—CIVIL DAMAGE LAW—DEATH—EVIDENCE—SUFFICIENCY.** Under either Bal. Code, § 2945, or Laws 1905, p. 120, a saloon keeper is liable to a minor child for the damages sustained by reason of the death of her father, where he sold liquor to the deceased under circumstances which would have led a man of ordinary intelligence to believe that intoxication would probably result, and where deceased became intoxicated and involved in a quarrel and was killed while making a deadly and unprovoked assault upon another; and a finding of damages in the sum of \$400 will not be disturbed where the evidence was conflicting. *Woodring v. Jacobino* 504

IRRIGATION:

See **WATERS AND WATER COURSES.**

ISSUANCE:

Of execution by one county upon judgment of other county, see **EXECUTION**, 1.

JEOPARDY:

Former jeopardy bar to prosecution, see **CRIMINAL LAW**, 4.

JOINDER:

Of causes of action, see **ACTION**, 1.

JOINT LIABILITY:

Verdict in favor of servant as exonerating master, see **MASTER AND SERVANT**, 30.

Parties liable for obstructing navigable stream, see **NAVIGABLE WATERS**, 2, 4.

JOINT TORT FEASORS:

Joint liability for obstructing stream, see **NAVIGABLE WATERS**, 2, 4.

JUDGES:

Certifying statement of facts outside of district, see **APPEAL AND ERROR**, 11.

Conduct of judge in criminal trial, see **CRIMINAL LAW**, 8.

Restraining unauthorized judicial act, see **PROHIBITION**, 2.

JUDGMENT:

Payment of judgment as waiver of right to appeal, see **APPEAL AND ERROR**, 2.

Review in general, see **APPEAL AND ERROR**.

Review of decision as involving discretion of court, see **APPEAL AND ERROR**, 13.

Foreclosure of mortgage, see **CHattel MORTGAGES**.

Issuance of execution upon judgment of other county, see **EXECUTION**, 1.

Liability of wife's estate for judgment against husband, see **HUSBAND AND WIFE**, 5.

Verdict in favor of servant as exonerating master, see **MASTER AND SERVANT**, 30.

Right of partner to confess judgment in tort, see **PARTNERSHIP**.

Service of publication, see **PROCESS**, 3, 4.

Conclusiveness of judgment as to existence of street on lake front, see **PUBLIC LANDS**, 7.

Act relating to execution sales as embracing provision for taking deficiency judgment in mortgage foreclosure, see **STATUTES**, 1.

Stipulation not confession of judgment, see **STIPULATIONS**.

Necessity for findings to support judgment of nonsuit, see **TRIAL**, 8.

1. **JUDGMENT—RECITALS OF SERVICE—PRESUMPTIONS—EVIDENCE TO OVERCOME—SUFFICIENCY—BURDEN OF PROOF.** In an action to set aside a default tax foreclosure judgment, the presumption of due service of summons, from a recital thereof in the judgment, is overcome, where the defendants prove that they did not appear and were not personally served, and produce the record in the tax case showing nothing beyond the publication of a void summons; and the burden is shifted to the tax title holder to show a valid service of process. *Gould v. White*..... 394
2. **SAME.** Where the record shows a judgment entered upon publication of a void summons, testimony of a very general nature tending to show the publication of summons other than the one on file, without showing the time, place, or manner of publication, is not sufficient to sustain the judgment. *Gould v. White*..... 394
3. **JUDGMENT—PROCESS—PUBLICATION.** A valid personal judgment cannot be entered upon a service by publication. *Hays v. Peavey* 78
4. **JUDGMENT—DEFAULT—VACATION—GROUNDS.** A default judgment in an action on contract is properly vacated where it appears that service of summons was made by publication and real property was attached, that the summons did not properly state the object of the action, and that a personal judgment was entered by default against the defendants so served without referring to the land attached, which was subsequently sold under execution. *Hays v. Peavey*.. 78
5. **JUDGMENT—VACATION—DISCRETION—APPEAL—REVIEW.** The granting of a motion to vacate a default judgment within the statutory

JUDGMENT—CONTINUED.

time will not be reversed except for abuse of discretion. *Hays v. Peavey* 78

6. JUDGMENT—CONCLUSIVENESS—RECITALS—PARTIES BOUND—STRANGERS. The rule that recitals in a judgment are not subject to collateral attack where the court had jurisdiction, and there is nothing in the record to contradict the recitals, has no application as to strangers to the record not parties or privies; hence, where a tax title holder conveyed and warranted the title, his grantees, in an action on the covenant, may show failure of title by reason of defects in the summons. *Wick v. Rea*..... 424
7. JUDGMENT—BAR—RES JUDICATA—MATTERS CONCLUDED. A judgment dismissing an action upon an express contract for a broker's commission in a specified sum is *res judicata* in a second action to recover for the same services on an agreement to pay the reasonable value of the services, where the findings of fact in the former action determined that the plaintiff had no agreement with defendant for a commission, and that plaintiff failed to prove that he acted as agent for the defendant in contracting the sale or that there was any contract existing between them. *Krug v. Hendricks*..... 209
8. JUDGMENT—BAR—RES JUDICATA—MATTERS CONCLUDED. Where, in a chattel mortgage foreclosure, judgment for a deficiency upon a separate obligation for the debt is denied to the plaintiff, his remedy is by appeal from the judgment, which otherwise becomes *res judicata* and a bar to another action to recover any deficiency arising on a sale of the mortgaged property. *Bradley Engineering and Machinery Co. v. Muzzy*..... 227

JUDICIAL DISTRICTS:

Division of counties into separate judicial districts, see COURTS, 1-3.

JUDICIAL FUNCTIONS:

Restraining exercise of, see PROHIBITION, 2, 3.

JUDICIAL NOTICE:

On appeal, see APPEAL AND ERROR, 12.

In civil actions, see EVIDENCE, 1.

JUDICIAL SALES:

On execution, see EXECUTION, 1, 3.

JURISDICTION:

Appellate jurisdiction, see APPEAL AND ERROR.

To vacate divorce, see DIVORCE.

Appointment of administrator, see EXECUTORS AND ADMINISTRATORS.

In mandamus, see MANDAMUS.

To issue prohibition, see PROHIBITION.

JURY:

- Review of verdicts on appeal, see **APPEAL AND ERROR**, 15, 16.
- Discharge in criminal case as bar to subsequent prosecution, see **CRIMINAL LAW**, 4.
- Instructions in criminal prosecutions, see **CRIMINAL LAW**, 9.
- Custody and conduct, see **CRIMINAL LAW**, 11.
- Verdict in condemnation proceedings, see **EMINENT DOMAIN**, 18.
- Impeachment of verdict by testimony or statements of jurors, see **NEW TRIAL**, 3.
- Interrogatories and findings as to casual or involuntary trespass, see **TRESPASS**.
- Instructions in civil actions, see **TRIAL**, 4-7.
- Taking case or question from jury at trial, see **TRIAL**, 3.
1. **JURY—RIGHT TO TRIAL—WAIVER.** Failure to demand a jury in a condemnation proceeding at the time the case is set down for trial waives the right to a jury trial. *Fruitland Irrigation Co. v. Smith* 185
 2. **JURY—DRAWING JURY—DIRECTORY PROVISIONS—APPEAL—HARMLESS ERROR.** Statutory provisions for the drawing of a panel are mainly directory, and failure to precisely conform thereto will not warrant a reversal of a conviction, where none of the jurors were incompetent or improperly drawn, no prejudice against the defendant was shown or any of his rights injuriously affected, and he declined to use an additional challenge accorded him. *State v. Barnes*..... 493
 3. **SAME—CHALLENGE TO THE PANEL—FOR CAUSE.** A challenge to the panel is not sustainable by reason of the drawing of three jurors who had served on a former trial, since they could be challenged for cause. *State v. Barnes*..... 493

KNOWLEDGE:

- Master's knowledge of defects in tools and appliances or dangers incident to employment, see **MASTER AND SERVANT**, 11-13, 15, 22.
- Servant's knowledge of defect or danger as element of assumption of risk by servant, see **MASTER AND SERVANT**, 13, 14, 16, 28.
- Of agent imputed to principal, see **PRINCIPAL AND AGENT**.

LACHES:

- Effect on equity, see **EQUITY**.
- As barring right to replevin, see **REPLEVIN**, 3.
- Failure to pay taxes as bar to redemption of property, see **TAXATION**, 6.
- On part of vendor in rescinding sale, see **VENDOR AND PURCHASER**, 2.

LANDLORD AND TENANT:

- Stay in forcible entry and detainer and right to rents pending appeal, see **APPEAL AND ERROR**, 9.
- Use of land under lease as constituting prior public use, see **EMINENT DOMAIN**, 3.

LANDLORD AND TENANT—CONTINUED.

Right of state to lease harbor area for railroad purposes, see **NAVIGABLE WATERS**, 9.

1. **LANDLORD AND TENANT—LEASE—CROPS—ASSIGNMENT—CONSENT OF LESSOR—WAIVER OF REENTRY.** The landlord's consent to the assignment of a lease is not necessary to transfer title to the crop where there was no nonassignment clause in the lease, nor where the crop had been harvested and marketed by the assignees and the right of reentry had been lost by nonaction of the lessor. *Cupples v. Level* 299

LATERAL SUPPORT: .

Filing claim for damages for removal of, see **MUNICIPAL CORPORATIONS**, 10.

LAW OF THE CASE:

Decision on appeal, see **APPEAL AND ERROR**, 23.

Res adjudicata, see **JUDGMENT**, 7, 8.

LEASES:

See **LANDLORD AND TENANT**.

LETTERS:

Admissibility of letters of co-conspirators to show creation of monopoly in sale of milk, see **CONSPIRACY**, 2.

LEVY:

Of execution, see **EXECUTION**, 2.

LICENSES:

Use of water under parol license as obtaining rights to realty by estoppel *in pais*, see **ESTOPPEL**, 1.

Sale of intoxicating liquors, see **INTOXICATING LIQUORS**, 1, 2.

Physicians and surgeons, see **PHYSICIANS AND SURGEONS**.

1. **LICENSES—PAROL—REVOCATION—FRAUDS, STATUTE OF.** A parol license to be exercised on the land of another creates an interest in land, is within the statute of frauds, and may be revoked by the licensor irrespective of performance and expenditures by the licensee. *Rhoades v. Barnes*..... 145

LIENS:

Waiver of tax lien, see **TAXATION**, 8.

LIFE INSURANCE:

See **INSURANCE**, 1.

LIMITATION OF ACTIONS:

New promise to pay as removal of bar to action on note, see **BILLS AND NOTES**, 2.

Action on claim against county for personal injuries, see **COUNTIES**, 3.

Criminal prosecution, see **CRIMINAL LAW**, 1.

Laches, see **EQUITY**.

Suit to quiet title, see **QUIETING TITLE**, 4.

1. **LIMITATION OF ACTIONS—REMOVAL OF BAR—CONTRACTS—DEFINITENESS.** A written promise to pay the principal of a promissory note for one thousand dollars, held and owned by O. L. T. of Chapman, Kansas, as soon as the promisor is able to spare the money or a reasonable time, sufficiently identifies a note for \$1,006.50 passed between the parties, and is sufficiently explicit to remove the bar of the statute of limitations, under Bal. Code, § 4816, relating to a new promise in writing signed by the party to be charged. *Thisler v. Stephenson* 605

LIQUIDATED DAMAGES:

See **DAMAGES**, 1.

LIQUORS:

See **INTOXICATING LIQUORS**.

LITTORAL RIGHTS:

See **NAVIGABLE WATERS**, 10-14.

LOCATION:

Of mining claim, see **MINES AND MINERALS**, 1.

LOGS AND LOGGING:

Damages for condemnation of shore lands by boom company, see **EMINENT DOMAIN**, 7, 9-11, 17, 18, 21.

Obstruction of navigation by booms, see **NAVIGABLE WATERS**, 1-4, 6, 11, 13.

Logs as subject of replevin, see **REPLEVIN**, 2-4.

MACHINERY:

Liability of employer for defective or dangerous machinery, see **MASTER AND SERVANT**, 2, 6, 8, 10, 12-14.

MANDAMUS:

Right to attorney's fees in mandamus to compel salary warrant, see **COSTS**, 1.

1. **MANDAMUS—PROCEDURE—RELIEF GRANTED—PARTIAL RELIEF—COUNTY OFFICERS—SALARY.** The procedure in mandamus being but a form of civil action under our code, it is not essential that the prayer be granted *in toto* or denied *in toto*; and upon an applica-

MANDAMUS—CONTINUED.

tion for a writ to secure a salary warrant for more than the relator is entitled, the court may grant the writ for a warrant for the sum to which the party may be entitled. *State ex rel. Maltbie v. Will* 453

MARSHALING ASSETS:

Rights of surety in default, see **PRINCIPAL AND SURETY**, 1.

MASTER AND SERVANT:

Contracts of employment by corporation, see **CORPORATIONS**, 3.

Measure of damages for breach of contract of employment, see **DAMAGES**, 3.

1. **MASTER AND SERVANT—CONTRACT OF EMPLOYMENT—BREACH—DAMAGES.** Upon breach of a contract to employ plaintiff for the term of one year, and to furnish material to build a house and house rent free during the employment, the measure of plaintiff's damages includes expenditures in building the house, although he was still living in it with rent free; as the house was not built independently of the contract, and he was not living in it under the contract after repudiation of the contract by the employer. *Enyart v. Inman-Poulsen Logging Co.*..... 38
2. **MASTER AND SERVANT—INJURIES—DEATH OF SERVANT—PERFORMANCE OF DUTY—QUESTION FOR JURY.** Where an employee took an oil can and ascended a ladder to oil machinery, which it was his duty to do eight or ten times a day, and was killed by being caught on an unguarded set screw on the way to the machinery, there is a question of fact for the jury as to whether he was killed while in the performance of his duty. *Bush v. Independent Mill Co.*..... 212
3. **MASTER AND SERVANT—NEGLIGENCE—RAILROADS—TRAIN DISPATCHING SYSTEM—TELEGRAPH STATIONS.** In an action for injuries received in a collision resulting from failure to promulgate proper train dispatching rules, negligence cannot be predicated on failure to establish telegraph or telephone stations at a point, when the orders were correctly received by telephone at that point; nor upon the fact that the accident would have been avoided by maintaining a telegraph station at some particular point on the road, when stations were maintained from five to eight miles apart. *Sipes v. Puget Sound Electric R.* 47
4. **SAME—NEGLIGENCE OF MASTER—RAILROADS—ROADBED.** Where the brass in the axle of a logging car is liable to be misplaced, allowing the frame to drop down, it is negligence for the railroad company to use the road, for the carriage of employees, after the county had so placed planking at a county road crossing that the planks would catch the frame of the car and cause injury to an employee riding on the cars. *Kluska v. Yeomans*..... 465

MASTER AND SERVANT—CONTINUED.

5. MASTER AND SERVANT—SAFE PLACE—FALL OF ROCK IN QUARRY—EVIDENCE—SUFFICIENCY. The owner of a quarry is not guilty of negligence, rendering it liable to an employee who was injured by the fall of rock from the side of a cliff, evidently jarred loose by a blast at another place, where it appears that no work had been done at that point for a month, that it had been reasonably inspected and there was no appearance of danger from a fall of rock, and such danger could only have been discovered by a very close inspection of the wall. *White v. Spokane & Inland Empire R. Co.*..... 670
6. MASTER AND SERVANT—GUARDING MACHINERY—FACTORY ACT—STATUTES—CONSTRUCTION—EJUSDEM GENERIS. The factory act, Laws 1903, page 40, requiring the safeguarding of certain specified machines of various kinds, "and machinery of other or similar description" in factories, will not be confined to the subjects mentioned on the theory of *ejusdem generis*, but includes friction wheels not named, since the rule has no application where the specified subjects greatly differ from one another and where such construction would violate the evident intent of the legislature. *Ward v. National Lumber & Box Co.* 304
7. SAME—NEGLIGENCE—PROXIMATE CAUSE. Where a millwright who was holding a post in position negligently let go and it fell, causing injury to a fellow servant, his negligence was the proximate cause of the injury, and it is immaterial that the post would not have fallen if a sling had been attached nearer the top of the post. *Desjardins v. St. Paul & Tacoma Lumber Co.*..... 278
8. MASTER AND SERVANT—NEGLIGENCE—APPLIANCE—PROXIMATE CAUSE. Where, in stepping over a shaft, the overalls of an employee were caught upon an unprotected, projecting set screw in a collar, the proximate cause of a resulting injury is the negligent failure to use a sunken set screw which would have avoided the danger. *Bush v. Independent Mill Co.*..... 212
9. MASTER AND SERVANT—FELLOW SERVANTS—SUPERIOR—DETAIL OF WORK. Where a millwright, acting as foreman, and assisting in the erection of a post, which he was holding in place with his hands, negligently let go, whereupon it fell and injured his helper, he is, as to such act, a fellow servant, where it appears that a mere boy could have held the post; since that was a mere detail of the work for which the master was not responsible. *Desjardins v. St. Paul & Tacoma Lumber Co.* 278
10. MASTER AND SERVANT—INJURY TO SERVANT—UNGUARDED MACHINERY—STARTING MACHINERY WITHOUT WARNING. The evidence is sufficient to sustain a verdict for injuries to a boiler maker's helper from a fall upon an unguarded shaft, where it appears that his superior ordered him into a place of danger near the shaft to assist in making repairs to a belt, promising that the machinery would not

MASTER AND SERVANT—CONTINUED.

- be started, and that the starting of the machinery without warning, while he without fault was placing the belt on the pulley, caused him to lose his balance and fall, and there were no guards or supports by which he could save himself. *Newcomb v. Puget Sound and Queen City Boiler Works*..... 419
11. SAME—COLLISION OF TRAINS—CONCURRENT NEGLIGENCE—PROXIMATE CAUSE. Where a collision was caused by the negligence of a flagman, sent ahead under verbal orders to flag trains at a certain station, where there were two other methods of flagging that would appear to be safer, and the company had tacitly admitted that the prevailing method was unsafe; the negligence of the company in failing to promulgate proper rules concurs with the negligence of the flagman as the proximate cause of the accident; as the facts constitute a continuous succession of events that should have been anticipated. *Sipes v. Puget Sound Electric R.*..... 47
12. MASTER AND SERVANT—ASSUMPTION OF RISKS—DUTY TO SERVANT. The fact that an employee as an oiler was also a millwright, does not preclude a recovery for his death caused by contact with a set screw, when the testimony shows that he could not make any alterations without obtaining the consent of the foreman, and that the foreman knew of the unguarded condition of the set screw and did not direct it to be safeguarded. *Bush v. Independent Mill Co.* 212
13. SAME—ASSUMPTION OF RISKS—OBVIOUS DANGERS. Knowledge that a grease cup was apparently too dangerous to be used, as conceived and constructed by the master, is not to be imputed to an oiler, where he had used it for three weeks without injury. *Ward v. National Lumber & Box Co.*..... 304
14. MASTER AND SERVANT—ASSUMPTION OF RISKS—NOTICE OF DANGER TO MASTER. It is not incumbent upon an oiler to report to the master as to the dangerous condition of machinery due to the original construction and arrangement, and not to want of repairs. *Ward v. National Lumber & Box Co.*..... 304
15. SAME—NOTICE TO MASTER—TIME—QUESTION FOR JURY. In such a case, where new planking had been laid at the crossing several days before the accident, and had been run over for at least two days, the time was sufficient to charge the defendant with notice of the change or to put defendant on inquiry; and the question of notice would be one of fact for the jury. *Kluska v. Yeomans*..... 465
16. MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—TWO WAYS—MOMENTARY FORGETFULNESS—QUESTION FOR JURY. It cannot be said as a matter of law, that an employee is guilty of contributory negligence in stepping over a shaft elevated 16 to 18 inches, upon which there was a projecting set screw known to him, where that was one of two ways used by different persons to reach the machinery to be

MASTER AND SERVANT—CONTINUED.

- olled, and the more convenient and practicable way owing to obstructions in the other way; since the act was not necessarily dangerous, and the jury had a right to infer that he had momentarily forgotten the set screw. *Bush v. Independent Mill Co.*..... 212
17. SAME—CONTRIBUTORY NEGLIGENCE—FAILURE TO OBSERVE RULES. Contributory negligence of a motorman cannot be predicated on his failure to give his brakeman a written order to flag a train, as required by the rules of the company, where the rule was habitually disregarded and had not been properly promulgated or posted or brought to plaintiff's notice. *Sipes v. Puget Sound Electric R.*.. 47
18. SAME—PLEADING AND PROOF—ISSUES—AMENDMENTS. Where defendant's proof showed the specific cause of the accident to be other than that alleged in the complaint, the plaintiff is entitled to the benefit of all the proofs, on challenge to the sufficiency of the evidence, as the complaint will be deemed amended to conform to the proof. *Kluska v. Yeomans*..... 465
19. MASTER AND SERVANT—NEGLIGENCE—ACCIDENT TO TRAINS—PRESUMPTIONS—PLEADING—SPECIFIC GROUNDS. The right to the presumption of negligence arising from proof of an accident to a train is not abandoned by reason of the fact that specific acts of negligence were alleged and no proof was made of such specific acts. *Kluska v. Yeomans*..... 465
20. MASTER AND SERVANT—NEGLIGENCE—RAILROADS—FLAGGING SYSTEM—EVIDENCE OF CUSTOM. Evidence of the system of flagging trains in use on other roads of like character is competent upon an issue as to defendant's negligence in employing an unsafe system which resulted in a collision. *Sipes v. Puget Sound Electric R.*..... 47
21. SAME. Upon an issue as to the safety of a train dispatching system, evidence tending to show what would have been a safe and proper order for the running of a train is admissible for the purpose of comparison. *Sipes v. Puget Sound Electric R.*..... 47
22. SAME—NEGLIGENCE OF MASTER—EVIDENCE—SUFFICIENCY. The evidence sustains a recovery for injuries received by an employee riding on a logging train, notwithstanding the appliances were of standard make and in common use, where it appears that it was a common occurrence for the brasses in the axle of the trucks to slip out, without any fault, allowing the frame to drop down, and that the frame thereby caught upon planks put down by the county at a county road crossing, and that the planks had been laid for several days, and long enough to give the defendant notice thereof, or to put defendant on inquiry; there being a conflict in the evidence as to whether the plaintiff had been notified not to ride upon the train. *Kluska v. Yeomans*..... 465

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23. **MASTER AND SERVANT—NEGLIGENCE—CAUSE OF DEATH—EVIDENCE—SUFFICIENCY—NONSUIT.** In an action for the death of a brakeman, alleged to have been knocked from a car by an unusual crash in switching, there is not sufficient evidence of the cause of his death to submit the case to a jury, and a nonsuit should have been granted, where there was no direct proof as to the cause of his death, and it merely appears that his body was found on the tracks about fifteen minutes after an unusual crash in switching cars, which experts testified would have been sufficient to knock him off the top of a car, that it would have been his duty to be at the brakes, that his lantern was found on the top of a car and he was last seen ascending a car; as the cause of death would be left to conjecture. *Weckter v. Great Northern R. Co.*..... 203
24. **SAME—DIRECTION OF VERDICT.** In such a case, it is proper to direct a verdict for the defendants, even if the plaintiff made a case in the first instance, where the defendants' evidence showed that the crash of cars was caused by two cars coming together on a track other than the one on which the brakeman met his death, and that the car he was seen to be climbing had been cut loose from the train and was slowly passing down a track other than the one on which the crash of cars occurred. *Weckter v. Great Northern R. Co.* 203
25. **SAME—CAUSE OF DEATH—EVIDENCE—SUFFICIENCY—QUESTION FOR JURY.** In an action for the death of an employee, there is sufficient evidence of the cause of his death to require submission of the case to the jury, where it appears that, as required to do eight or ten times a day, he started with an oil can evidently to pass a line shaft upon which there was an unguarded set screw, in order to oil machinery, that his trouser's leg was found caught by the set screw, torn and wound around the shaft, and he was hurled to the floor, receiving injuries from which he died. *Bush v. Independent Mill Co.* 212
26. **SAME—DUTIES OF SERVANT—EVIDENCE—MATERIALITY.** In an action for the death of an oiler, who was also a millwright, expert evidence as to the duties of a millwright is inadmissible where the deceased was not employed in such duties. *Bush v. Independent Mill Co.* 212
27. **MASTER AND SERVANT—NEGLIGENCE—RAILROADS—PROMULGATION OF TRAIN RULES.** The sufficiency and reasonableness of rules and regulations promulgated for the running of trains is a mixed question of law and fact where there were other and safer methods. *Sipes v. Puget Sound Electric R.*..... 47
28. **MASTER AND SERVANT—EXCAVATIONS—CONTRIBUTORY NEGLIGENCE—ASSUMPTION OF RISKS—QUESTION FOR JURY.** In an action by an employee for injuries sustained through the caving in of the walls

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of a pit, whether the plaintiff was guilty of contributory negligence or assumed the risks are questions for the jury, where it appears that the plaintiff, a young, inexperienced man, was directed to work in a pit dug in soft filled-in earth, which was soaked with water, that he did not know of the danger, was informed that the sliding earth did not amount to anything, and that two experienced men were working in the same pit at a more dangerous place than that assigned to the plaintiff. *Johnson v. Collier*..... 478

29. **MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.** An oiler is not guilty of contributory negligence, as a matter of law, in attempting to take hold of a grease cup with his left hand instead of his right, where it would have been inconvenient to do so, and it does not appear to have been any safer to use his right hand. *Ward v. National Lumber & Box Co.*..... 304
30. **MASTER AND SERVANT—JOINT LIABILITY—VERDICT EXONERATING NEGLIGENT SERVANT—JUDGMENT.** A verdict in favor of the servant exonerates the master, in an action against an electric railway and its general manager for injuries received by a motorman in a collision, where the only evidence of negligence was that charged against the general manager in failing to promulgate proper train dispatching rules. *Sipes v. Puget Sound Electric R.*..... 47

MATURITY:

Of note, see **BILLS AND NOTES**, 2, 7.

MEASURE OF DAMAGES:

See **DAMAGES**, 2, 3.

For fraud in sale of corporate stock, see **FRAUD**, 2.

For breach of contract of employment, see **MASTER AND SERVANT**, 1.

For false representations of agent, see **VENDOR AND PURCHASER**, 7.

MEMORANDA:

Required by statute of frauds, see **FRAUDS**, **STATUTE OF**.

MINES AND MINERALS:

1. **MINES AND MINERALS—ACTION FOR POSSESSION—COMPLAINT—PLEADING—TITLE.** The ordinary allegation of title generally is sufficient in an action to recover the possession of a mining claim, without stating the facts necessary to show a valid location under the mineral laws, which are matters of evidence. *National Milling & Mining Co. v. Piccolo*..... 617
2. **SAME—CLAIMS—DESCRIPTION.** Descriptions of a mining claim in location notices and in a complaint are sufficiently definite, where the defendant was not misled and knew the boundaries from plaintiff's long possession. *National Milling & Mining Co. v. Piccolo*. 617

MINES AND MINERALS—CONTINUED.

3. **SAME—ACTION FOR POSSESSION—VARIANCE.** In an action to recover possession of a mining claim, in which there is no dispute as to the boundaries, a variance between the descriptions in location notices is not material, where both included the plaintiff's improvements, the claims were marked on the ground, and the boundaries were known to defendant, who was not misled to his prejudice, within Bal. Code, § 4949. *National Milling & Mining Co. v. Piccolo*. . . 617
4. **SAME—CLAIMS—RELOCATION — STATUTES — CONSTRUCTION.** Under Laws 1899, p. 71, § 8, to relocate a forfeited mining claim it is necessary to sink a new discovery shaft or sink the original shaft ten feet deeper; and this requirement is not excused by § 9, providing that the "provision herein relating to discovery shafts shall not apply to any location west of the summit of the Cascade mountains," in case of an attempt to take advantage of a forfeiture. *National Milling & Mining Co. v. Piccolo*. 617
5. **SAME—UNPATENTED CLAIMS—EJECTMENT—TITLE.** In an action to recover possession of unpatented mining claims, the better title prevails, and the rule that the plaintiff must recover, if at all, on the strength of his own title does not apply. *National Milling & Mining Co. v. Piccolo*. 617
6. **SAME—SUPERIOR TITLE.** As between two claimants to a mineral location, the better title lies with the one who for years spent large sums of money in a good faith endeavor to develop a mine, even if there was a forfeiture by failure to do assessment work, as against another who entered in the absence of the first claimant with the sole purpose of appropriating the fruits of the other's labor, and who failed to comply with the mineral laws as to relocations; there having been no abandonment by the first claimant. *National Milling & Mining Co. v. Piccolo*. 617

MISCONDUCT:

- Of attorney, ground for disbarment, see ATTORNEY AND CLIENT, 1.
- Of trial judge, see CRIMINAL LAW, 8.
- Of jury, see CRIMINAL LAW, 11.
- Of bailiff not ground for new trial, see CRIMINAL LAW, 12.
- Of counsel or party ground for new trial, see NEW TRIAL, 1.

MISMANAGEMENT:

- As ground for receiver for corporation, see CORPORATIONS, 5.

MISREPRESENTATION:

- By insured, see INSURANCE, 1.
- Affecting validity of contract for sale of land, see VENDOR AND PURCHASER, 1, 2, 5-7.

MONOPOLIES:

Grants of privileges or immunities, see **CONSTITUTIONAL LAW**.

MORTGAGES:

Of personal property, see **CHATTEL MORTGAGES**.

Community property, see **HUSBAND AND WIFE**, 4.

Act relating to execution sales as embracing provision for taking deficiency judgment in mortgage foreclosures, see **STATUTES**, 1.

MOTIONS:

Presentation of objections for review, see **APPEAL AND ERROR**, 4.

For direction of verdict, see **TRIAL**, 3.

1. **MOTIONS—NOTICES—SERVICE**. Under Bal. Code, § 4889, providing for the service of notices upon attorneys by leaving a copy at his office during his absence with his clerk or person having charge, or in a conspicuous place in the office, if no one is in charge, a service is good when made by dropping a copy through the transom on the floor of the office in front of the front door, which was locked, no one being in the office; especially where, upon calling at the office next morning, the copy is found in the possession of the clerk. *Spencer v. Arlington*..... 259

MUNICIPAL CORPORATIONS:

Title acquired by city in land dedicated for street, see **DEDICATION**.

Exercise of power of eminent domain, see **EMINENT DOMAIN**, 5, 6, 16, 19.

Extent and limits of franchise to gas company, see **GAS**.

Ordinances regulating liquor licenses, see **INTOXICATING LIQUORS**, 1, 2.

Collision of street cars with persons or vehicles on track, see **STREET RAILROADS**.

1. **MUNICIPAL CORPORATIONS—IMPROVEMENTS—PROPERTY ASSESSABLE—STREET RAILWAY FRANCHISE**. Under Laws 1907, p. 316, authorizing the assessment for local improvements of lots, blocks, tracts or parcels of land "or other property," the franchise of a street railway company to use a street is not *ejusdem generis* or assessable, but is an easement only, and of an intangible quantity; and such statutes will not be enlarged by construction. *In re Third Avenue, Seattle* 460
2. **MUNICIPAL CORPORATIONS — IMPROVEMENTS — ASSESSMENTS—INSUFFICIENT ESTIMATES—EFFECT**. The fact that a municipal improvement was estimated to cost only \$6,000, does not of itself make an assessment for nearly \$15,000 void for want of jurisdiction to make it, or because it operated as a fraud upon the property owners, in view of a statute requiring the court to enforce the lien "to the extent of the proper proportion of the value of the work," according to the benefits received, regardless of irregularities or defects; since the failure to

MUNICIPAL CORPORATIONS—CONTINUED.

- make a proper estimate was a mere defect in the proceeding, and not a fraud upon the property owners. *Chehalis v. Cory*..... 190
3. MUNICIPAL CORPORATIONS—ASSESSMENTS—BENEFITS—APPEAL—REVIEW. The assessments of benefits from a local improvement, made by the commission appointed for that purpose, will not be disturbed on appeal where there were differences of opinion and conflicting evidence; and it is immaterial that the ownership of several lots was taken into consideration if the commission arrived at the correct result. *In re Elliott Avenue and Milwaukee Street, Seattle*.... 297
4. MUNICIPAL CORPORATIONS—IMPROVEMENTS—LIABILITY OF CONTRACTOR—ASSIGNMENT TO INDEPENDENT CONTRACTOR. After assignment of a contract for street improvements to an independent contractor, the original contractor is not liable for the negligence of the former causing damages to the private property of a gas company in the streets; since the duty owed the gas company is entirely different from that owed to the traveling public. *Seattle Lighting Co. v. Hawley*..... 137
5. SAME—PROHIBITION OF ASSIGNMENT—EFFECT. That an assignment of a contract for street improvements is prohibited by the terms of the contract and by the city charter, does not affect the legal relations of the parties, or render the assignor liable for the acts of the assignee; since the prohibitions were intended for the benefit of the city. *Seattle Lighting Co. v. Hawley*..... 137
6. SAME—TERMS OF CONTRACT. The fact that contractors for a street improvement agreed with the city to do the work at their own risk, does not render them liable for negligence of their assignees, if the city was not liable therefor. *Seattle Lighting Co. v. Hawley*.... 137
7. MUNICIPAL CORPORATIONS—CONTRACTS—CREATING INDEBTEDNESS—ISSUANCE OF BONDS IN PAYMENT OF UNAUTHORIZED CONTRACT. Under Bal. Code, § 1077, requiring a town to sell bonds issued for the purpose of purchasing water works, as deemed for the best interests of the town, the town has no authority to issue bonds and deliver them to bankers who advanced the money to purchase the water works at the special instance and request of the town. *Hansard v. Green*. 161
8. SAME—ACQUISITION OF WATER WORKS—SUBMISSION TO VOTE—ORDINANCE—REQUISITES. An ordinance submitting to a vote of the people a proposed acquisition of water works by a town, is insufficient in that it fails to submit the "system or plan" proposed, as required by statute, where it merely recites the advisability of the purchase and the issuance of bonds to pay for the same, without setting out the matters proper to be considered respecting the time the bonds are to run, rate of interest, etc., including a method for the payment of the bonds. *Hansard v. Green*..... 161

MUNICIPAL CORPORATIONS—CONTINUED.

9. SAME—ACTIONS—PLEADING—INTERVENTION—PARTIES ENTITLED. In an action against a town to enjoin the issuance of bonds in payment of a contract made by the town without authority of law, in which the town defaults, the contractors cannot be allowed to intervene and obtain the benefit of performance of the contract. *Hansard v. Green* 161
10. MUNICIPAL CORPORATIONS—ACTIONS—PRESENTING CLAIM—DAMAGES FROM GRADING STREET. The charter of Spokane requiring all claims for damages for personal injuries or for injuries to property, sustained by reason of the negligence of the city, to be filed with the city clerk within one month, applies to claims for damages to lots by reason of the negligent removal of lateral support in grading a street. *Smith v. Spokane*..... 276

NAVIGABLE WATERS:

- Dedication of street along shore line of lake and rights of abutting purchasers, see DEDICATION.
- Ejectment for shore lands, see EJECTMENT, 2-4.
- Damages for condemnation of shore lands by boom company, see EMINENT DOMAIN, 7, 9-11, 17, 18, 21.
- Prevention of access to navigable waters as ground for compensation, see EMINENT DOMAIN, 7.
- Bodies and streams of water not capable of navigation, see WATERS AND WATER COURSES.
1. NAVIGABLE—WATERS—OBSTRUCTIONS—DAMAGES—NEGLIGENCE. Damages from obstructions in a river, causing an overflow of lands, may be recovered irrespective of negligence on the part of defendant in the maintenance of dams, booms, or piers near plaintiff's lands, as the injury is not the natural result of the use of the stream as a highway. *Gilson v. Cascade Lumber Co.*..... 289
 2. SAME—PARTIES LIABLE. An order compelling a boom company to remove a boom and clear away logs and jams in a river, is warranted, notwithstanding that the acts of loggers were claimed to have caused the obstructions, where it appears by the findings that the boom company contracted with loggers for the use of its splash dams, whereby logs were driven down the stream by artificial freshets, a toll being paid to the company for such drives, that the log jams and injury to riparian owners resulted therefrom, that more logs were driven down than could be handled by the company's boom, and that the loggers placed a boom across the river to hold such accumulations, which boom the company opened from time to time and replaced; since the loggers are shown to be so closely connected with the company as to be either its servants or joint tortfeasors. *Hulet v. Wishkah Boom Co.*..... 510
 3. NAVIGABLE WATERS — OBSTRUCTIONS — INJUNCTIONS — PARTIES ENTITLED TO SUE. Riparian owners on a navigable stream, whose means

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of ingress and egress to and from their lands are totally obstructed by a boom company, are entitled to maintain an action to enjoin the obstruction, although it may be a public nuisance. *Hulet v. Wishkah Boom Co.*..... 510

4. NAVIGABLE WATERS—OBSTRUCTION—DAMAGES—JOINT LIABILITY—INSTRUCTIONS. Instructions authorizing a joint judgment against a driving company and a boom company for damages for obstructions causing an overflow of a stream, if the jury found that they were acting in concert, are not objectionable because of evidence tending to show injuries resulting from separate acts, where the jury were told that, if the injuries were caused by one and not the other and they were not acting in concert, they should bring in a verdict against the one that caused the injury. *Pealer v. Grays Harbor Boom Co.* 415
5. NAVIGABLE WATERS—NAVIGABILITY—PLEADINGS—ISSUES AND PROOF. Where the complaint alleges, and the answer admits, that a slough is navigable, it is not error to exclude evidence to show that it was navigable only for floating logs and not in a "commercial sense," as there was no issue as to the navigability. *Lownsdale v. Grays Harbor Boom Co.*..... 542
6. NAVIGABLE WATERS—RIPARIAN RIGHTS—OBSTRUCTIONS—ACT OF GOD—QUESTION FOR JURY. Whether floods and an ice jam were so unusual and extraordinary as to be deemed an "act of God" is a mixed question of law and fact, to be determined by the jury under proper instructions, in an action by a riparian owner for damages for obstructing the stream. *Gilson v. Cascade Lumber Co.*..... 289
7. NAVIGABLE WATERS—LANDS UNDER WATER—RIGHTS OF STATE. Under Const., art. 17, § 1, the state owns the beds and shores of all navigable waters up to the line of ordinary high tide. *Grays Harbor Boom Co. v. Lownsdale.*..... 83
8. NAVIGABLE WATERS—LAND UNDER WATER—TITLE—LOGS—BOOM COMPANIES—RIGHTS CONVEYED. As the state reserved the title in fee to the beds and shores of navigable waters, up to the line of mean high tide, a conveyance of the same by the state to a boom company for booming purposes, grants the exclusive use thereof, except a free passageway between the boom and one of its shores for water craft "for the ordinary purposes of navigation." *Lownsdale v. Grays Harbor Boom Co.*..... 542
9. NAVIGABLE WATERS—COMMERCE—LANDS UNDER WATERS—HARBOR AREAS—LEASES—RAILROAD PURPOSES. The provision in Const., art. 15, § 1, that the harbor area shall never be sold or granted but shall be reserved for "landings, wharves, streets and other conveniences of navigation and commerce," has reference to commerce both by land and water, as "navigation" is not used in a restrictive sense; hence, under art. 15, § 2, authorizing the leasing for terms not exceeding

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- thirty years, of the right to build on the harbor area "wharves, docks, and other structures," the state may lease the right to build a railroad on the harbor area; "other structures" in section 2 being equivalent to "other conveniences" of commerce in section 1. *State ex rel. Hulme v. Grays Harbor and Puget Sound R. Co.*..... 530
10. NAVIGABLE WATERS—TIDE LANDS—RIPARIAN RIGHTS. An upland owner on navigable waters has no riparian rights where, in order to reach his lands from navigable waters, he must cross over the tide or shore lands of another which the state has sold. *Lounsdale v. Grays Harbor Boom Co.*..... 542
11. SAME—RIPARIAN OWNERS—RIGHTS ON TIDE WATERS. The objection that riparian owners on a tide water stream have no riparian rights of ingress and egress by reason of the state's ownership of intervening tide lands, does not go to their right to an injunction to prevent artificial freshets whereby their uplands are damaged and washed away, and logs deposited thereon, or to prevent unnecessary interference with the public right of navigation on the stream. *Hulet v. Wishkah Boom Co.*..... 510
12. SAME—RIGHTS OF UPLAND OWNER. In ejectment for upland bordering on a navigable stream, the plaintiff cannot recover damages for the use of land below mean high tide. *Lounsdale v. Grays Harbor Boom Co.* 542
13. SAME—BANKS AS RETAINING WALL FOR BOOM. Where the banks of a navigable stream are perpendicular and mark the line of ordinary high tide, the upland owner cannot recover from a boom company owning the tide lands for the use of the bank as one of the retaining walls of its boom. *Lounsdale v. Grays Harbor Boom Co.* 542
14. NAVIGABLE WATERS—LITTORAL RIGHTS—DEDICATION—SHORE LANDS. The title to shore lands being in the United States, and in the state after the adoption of the constitution, an upland owner, by dedicating a plat covering shore lands on a navigable lake, acquires no title thereto, and none can pass from him by deed or execution sale. *Gifford v. Horton.*..... 595

NECESSITY:

For objections or exceptions in lower court, see APPEAL AND ERROR, 3-7.

For pleading fraud in action by attorney for services, see ATTORNEY AND CLIENT, 3.

For demand by plaintiff for allowance to complete contract in action for balance due, see CONTRACTS, 3.

For condemnation of lands for public use, see EMINENT DOMAIN, 4-6.
Consent of lessor to assignment of lease on transfer of crops, see LANDLORD AND TENANT.

For tender of taxes, see TAXATION, 9-11.

Of findings to support judgment of nonsuit, see TRIAL, 8.

NEGLIGENCE:

- Liability for failure to indorse payments on note, see **BILLS AND NOTES**, 5.
- With respect to care or use of bridges, see **BRIDGES**.
- Of person injured by defect in bridge, see **BRIDGES**.
- Invitation to passenger to cross trestle, see **CARRIERS**.
- Of passenger, see **CARRIERS**, 4.
- Acts and statements accompanying or connected with transaction as constituting part of *res gestae*, see **EVIDENCE**, 2.
- Injuries from accidental explosions, see **EXPLOSIVES**.
- Failure to provide safe way around obstruction in public road, see **HIGHWAYS**.
- Of employers, see **MASTER AND SERVANT**.
- Contributory negligence of servant, see **MASTER AND SERVANT**, 16, 17, 28, 29.
- Concurrent negligence of master and servant, see **MASTER AND SERVANT**, 11.
- Risks assumed by servant, see **MASTER AND SERVANT**, 12-14, 28.
- Injury from public improvements by assignee of contract, see **MUNICIPAL CORPORATIONS**, 6.
- Accidents at railroad crossings, see **RAILROADS**.
- Injuries by collision with street cars, see **STREET RAILROADS**.
- Of vendor barring right to rescission of contract, see **VENDOR AND PURCHASER**, 2.

NEGOTIABLE INSTRUMENTS:

- See **BILLS AND NOTES**.

NEW PROMISE:

- To pay note within reasonable time, see **BILLS AND NOTES**, 2.
- Within statute of limitations, see **LIMITATION OF ACTIONS**.

NEW TRIAL:

- Misconduct of juror as ground for, see **CRIMINAL LAW**, 11.
- Misconduct of bailiff as ground for, see **CRIMINAL LAW**, 12.
- 1. **NEW TRIAL—TRIAL—MISCONDUCT OF COUNSEL.** It is not misconduct of counsel entitling a party to a new trial, that in argument to the jury counsel quoted the testimony of witnesses from the notes of the stenographer, no claim being made that they were incorrectly quoted. *Ralton v. Sherwood Logging Co.*..... 254
- 2. **NEW TRIAL—TRIAL—ADVISORY VERDICT—ERROR OF LAW.** Where the question of damages is submitted to a jury in an equity case for an advisory verdict, it is error to grant a new trial for error of law in giving instructions to the jury, where the court is of the opinion that the evidence warranted the verdict. *Pealer v. Grays Harbor Boom Co.* 415

NEW TRIAL—CONTINUED.

3. **NEW TRIAL—MISCONDUCT OF JURY—VERDICT—IMPEACHMENT—AFFIDAVITS OF JURORS.** On motion for a new trial the verdict of a jury cannot be impeached by affidavits of the jurors showing that they arrived at the verdict by consideration of a matter not in issue and withdrawn by the instructions given; especially in view of Bal. Code, § 5071, allowing impeachment of a verdict by affidavits of jurors only in case it was arrived at by resort to chance or lot. *Ralton v. Sherwood Logging Co.*..... 254
4. **NEW TRIAL—DISCRETION—REMITTING EXCESSIVE VERDICT.** It is discretionary for the trial court to refuse a new trial on condition of remitting part of an excessive verdict, where the correct recovery was capable of a mathematical calculation. *Meza v. Pfister Co.*. 7

NOTES:

Promissory notes, see **BILLS AND NOTES**.

NOTICE:

Necessary party upon whom to serve notice of appeal, see **APPEAL AND ERROR**, 8.
 Defenses to bill or note, see **BILLS AND NOTES**, 3, 8.
 Defects in bridge as affecting liability for injuries therefrom, see **BRIDGES**.
 Of officers authority to employ servants, see **CORPORATIONS**, 3.
 Taking deposition, see **DEPOSITIONS**.
 Judicial notice, see **EVIDENCE**, 1.
 Levy of execution, see **EXECUTION**, 2.
 Of dangerous character of chemical, see **EXPLOSIVES**, 3, 4.
 To master of defects in appliances, see **MASTER AND SERVANT**, 11-13, 15, 22.
 Defects or danger as element of assumption of risk by servant, see **MASTER AND SERVANT**, 13, 14, 16, 28.
 Description of mining claim in location notice, see **MINES AND MINERALS**, 2.
 Of motion, see **MOTIONS**.
 Of agent imputed to principal, see **PRINCIPAL AND AGENT**.
 In foreclosure of delinquency tax certificate, see **TAXATION**, 4, 5.

NUISANCE:

Obstructions in navigable stream, see **NAVIGABLE WATERS**, 3.

OBJECTIONS:

Review as dependent on objection or exception made on trial, see **APPEAL AND ERROR**, 3, 4.
 To variance and waiver thereof, see **PLEADING**, 3.
 Preservation of objections on refusal to allow argument, see **TRIAL**, 2.

OBSTRUCTIONS:

Of highways, see HIGHWAYS.

Of navigation, see NAVIGABLE WATERS, 1-4, 6, 11, 13.

Of irrigating ditch, see WATERS AND WATER COURSES, 9, 10.

OFFICERS:

Right to attorney's fees in mandamus to secure salary warrant, see COSTS, 1.

County board, see COUNTIES.

Division of county into separate judicial districts by county commissioners, see COURTS, 1-3.

Misconduct of officer in charge of jury as ground for new trial, in criminal prosecutions, see CRIMINAL LAW, 12.

Mandamus as proper remedy to compel payment of salary, see MANDAMUS.

Authority of land commissioner to reconsider official acts relating to public lands, see PUBLIC LANDS, 2.

OFFSET:

See SET-OFF AND COUNTERCLAIM.

ORAL CONTRACTS:

See FRAUDS, STATUTE OF.

Specific performance, see SPECIFIC PERFORMANCE, 1.

ORAL EVIDENCE:

See EVIDENCE, 3-6.

ORDER OF PROOF:

In civil actions, see TRIAL, 1.

ORDERS:

Requiring payment of money to clerk in supplemental proceedings as harmless error, see EXECUTION, 4.

ORDINANCES:

Submitting proposed acquisition of water works to vote of people, see MUNICIPAL CORPORATIONS, 8.

OWNERSHIP:

Necessity for alleging in indictment for robbery, see ROBBERY.

PAIS:

Estoppel in, see ESTOPPEL, 1.

PANEL:

Challenge to jury panel, see JURY, 3.

PARENT AND CHILD:

Civil liability for sale of liquor to parent, see **INTOXICATING LIQUORS**, 3.

PAROL AGREEMENTS:

Effect and requirements of statute of frauds, see **FRAUDS, STATUTE OF**.

PAROL EVIDENCE:

See **EVIDENCE**, 3-6.

PARTIES:

On appeal or writ of error, see **APPEAL AND ERROR**, 8.

Rights and liabilities as to costs, see **COSTS**.

Interveners in action to enjoin issuance of bonds in payment of unauthorized contract, see **MUNICIPAL CORPORATIONS**, 9.

Parties entitled to enjoin obstructions in navigable stream, see **NAVIGABLE WATERS**, 3.

Husband or wife in action to foreclose against community property, see **TAXATION**, 12.

Husband or wife as witness, see **WITNESSES**.

PARTNERSHIP:

1. **PARTNERSHIP—POWERS OF PARTNERS—CONFESSING JUDGMENT IN TORT—PROCESS.** In the absence of statute, one partner cannot, in an action of replevin arising in tort, confess by stipulation a judgment enforceable against partnership property, without his copartner's consent; Bal. Code, § 5095, for the confession of judgments by a partner being confined to actions on contract. *Hoffman v. Spokane Jobbers Association*..... 179

PART PERFORMANCE:

Taking contract out of statute of frauds, specific performance of contracts, see **SPECIFIC PERFORMANCE**, 1.

PASSENGERS:

Who are, see **CARRIERS**, 1.

PAYMENT:

On judgment as waiver of right to appeal, see **APPEAL AND ERROR**, 2. Of note, see **BILLS AND NOTES**, 2, 3, 5-7.

Order directing payment of money to clerk in supplemental proceedings as harmless error, see **EXECUTION**, 4.

Transfer of title to goods sold on payment of price, see **SALES**, 2.

Failure to pay taxes as laches barring right to redeem property, see **TAXATION**, 6.

PERFORMANCE:

Performance or breach of contract, see **CONTRACTS**.

PERMISSIVE USE:

To acquire right by prescription, see **WATERS AND WATER COURSES**, 15, 16.

PERSONAL INJURIES:

From defects in bridges, see **BRIDGES**.

To passenger, see **CARRIERS**.

Inadequate and excessive damages, see **DAMAGES**, 4, 5.

Measure of damages, see **DAMAGES**, 2.

From explosions, see **EXPLOSIVES**.

From negligence in obstruction of highway, see **HIGHWAYS**.

To employee, see **MASTER AND SERVANT**.

To traveler on highway crossing railroad, see **RAILROADS**.

To persons on cars or on or near street railroad tracks, see **STREET RAILROADS**.

PHYSICIANS AND SURGEONS:

1. **PHYSICIANS AND SURGEONS — OFFENSES — PRACTICING WITHOUT A LICENSE.** A law making it a criminal offense to practice medicine without a license is valid. *State v. Dodson*..... 31
2. **SAME—PROSECUTION—PROOF OF LICENSES—PRIMA FACIE CASE.** Upon a prosecution for practicing medicine without a license, the statutory *prima facie* case is made against the defendant by proof that no license is on file with the county clerk, without proving that the defendant was not a practicing physician before the law went into effect. *State v. Dodson*..... 31

PLACE:

Of making demand for payment of note, see **BILLS AND NOTES**, 6.

PLEADING:

Joinder of causes of action, see **ACTION**, 1.

Review of rulings as dependent on presentation of question in lower court, see **APPEAL AND ERROR**, 3, 4.

Adequate remedy by appeal as bar to review by certiorari of order striking amended complaint, see **CERTIORARI**, 2.

In action by minority stockholders for appointment of receiver, see **CORPORATIONS**, 5.

Actions against corporations, see **CORPORATIONS**, 4.

In action of ejectment, see **EJECTMENT**, 2.

In condemnation proceedings, see **EMINENT DOMAIN**, 13, 14.

Effect of admitting complaint on right to defenses, see **FORCIBLE ENTRY AND DETAINER**.

In actions for fraud, see **FRAUD**.

Indictment or criminal information or complaint, see **INDICTMENT AND INFORMATION**.

In action by servant for personal injuries, see **MASTER AND SERVANT**, 18, 19.

PLEADING—CONTINUED.

In action to recover possession of mining claim, see MINES AND MINERALS, 1, 2.

In action to enjoin issuance of bonds in payment of unauthorized contract, see MUNICIPAL CORPORATIONS, 9.

Issues and proof as to navigability of stream, see NAVIGABLE WATERS, 5.

In suits to quiet title, see QUIETING TITLE, 2.

In action of claim and delivery, see REPLEVIN, 3.

Stipulation submitting consolidated actions on merits not admission of relevancy of pleadings, see STIPULATIONS.

In action by owner to set aside tax proceedings, see TAXATION, 7, 8, 12.

1. PLEADING—DENIALS—ADMISSIONS IN ANSWER—CORPORATIONS—STOCKHOLDERS. The denial of each and every allegation of a complaint by one alleging himself to be a stockholder in a corporation does not put his ownership of stock in issue, where other portions of the answer are pregnant with admissions of such fact. *Van Horn v. New Western Shingle Co.*..... 117
2. PLEADING—VARIANCE—PREJUDICE. Under a complaint for the reasonable value of services rendered "at the instance and request of the defendant" it is not a fatal variance to prove that the services were rendered "with the knowledge and consent of the defendant," where there was no showing that the opposite party was actually misled as required by Bal. Code, § 4949. *Butterworth & Sons v. Teale* 14
3. PLEADING—VARIANCE—WAIVER OF OBJECTION. In an action to recover for services rendered, the defendant cannot claim a variance in that the complaint was for the breach of an express contract, while the case made was on *quantum meruit* for services rendered, where it appears that the complaint was susceptible of two constructions, covering either phase of the case, and the defendant had not moved that it be made more definite and certain or required that plaintiffs make an election before the trial. *Blair v. Wilkeson Coal & Coke Co.*..... 334

PLEDGES:

See CHATTEL MORTGAGES; PRINCIPAL AND SURETY.

POLICY:

Of insurance, see INSURANCE.

PRACTICE:

See APPEAL AND ERROR; CERTIORARI; CRIMINAL LAW; JUDGMENT; JURY; NEW TRIAL; TRIAL.

PREFERENCES:

Right to purchase tide land, see PUBLIC LANDS, 3, 4-6.

PREJUDICE:

Ground for reversal in civil actions, see APPEAL AND ERROR, 17-22.

Ground for reversal in criminal prosecution, see CRIMINAL LAW, 16.

PRESCRIPTION:

See WATERS AND WATER COURSES, 12, 13, 15-17.

PRESENTMENT:

Of bill or note, see BILLS AND NOTES, 7.

PRESUMPTIONS:

Time of interlineation in public record, see ALTERATION OF INSTRUMENTS, 1.

As to community nature of property, see HUSBAND AND WIFE, 2, 3.

Of due service of summons from recitals in judgment, see JUDGMENT, 1, 2.

As to negligence from proof of accident, see MASTER AND SERVANT, 19.

As to gift by wife's conveyance to husband, see TRUSTS.

PRINCIPAL AND AGENT:

See BROKERS.

Representation of corporation by agent, see CORPORATIONS, 3.

Damages for termination or breach of agency contract for exclusive sale of goods, see DAMAGES, 1.

Persons having possession or control of goods for purposes of sale, see FACTORS.

Waiver of forfeiture provision in policy, see INSURANCE, 3.

1. **PRINCIPAL AND AGENT—NOTICE TO AGENT—IMPUTED KNOWLEDGE.** Knowledge of the vendor's servant that logs sold had been wilfully cut and converted by the vendor, cannot be imputed to the vendee from the fact that the vendee afterwards employed the same servant to take out part of the logs, the knowledge having been acquired in the service of the vendor and not communicated to the vendee. *Meyers v. Gerhart*..... 657

PRINCIPAL AND SURETY:

1. **PRINCIPAL AND SURETY—MARSHALING ASSETS—PLEDGES—RIGHTS OF SURETY.** Equity will not decree a marshaling of assets in favor of sureties in default, where it would defeat the right of a judgment creditor to satisfy his judgment out of pledged property. *First National Bank of Wenatchee v. Fowler*..... 65
2. **PRINCIPAL AND SURETY—EXHAUSTION OF REMEDY AGAINST SURETY—STATUTES—APPLICATION.** Under Bal. Code, §§ 5707, 5708, providing for determining the questions of suretyship as between defendants

PRINCIPAL AND SURETY—CONTINUED.

primarily and secondarily liable, and Laws 1899, p. 373, § 192, defining a person "primarily liable to be one who is absolutely required to pay the same," debtors who are expressly made principal contractors cannot avail themselves of the statute to determine equities between themselves, as against objection by the plaintiff. *First National Bank of Wenatchee v. Fowler*..... 65

PROCESS:

Defects in as affecting *bona fides* in purchase at execution sale, see EXECUTION, 3.

Defects as grounds for collateral attack on judgment, see JUDGMENT, 6.

Defects in process as grounds for vacating judgment, see JUDGMENT, 1, 2, 4.

To sustain personal judgment, see JUDGMENT, 3.

In actions against partnerships, see PARTNERSHIP.

In replevin, see REPLEVIN, 1.

In foreclosure of delinquency tax certificate, see TAXATION, 4, 5.

1. PROCESS—SUMMONS BY PUBLICATION—STATING OBJECT OF ACTION. Where the object of an action was to ascertain and fix the amount of an indebtedness on contract and to direct the sale of attached property to pay the same, a summons for publication is irregular and misleading where it states that the object of the action is to recover a personal judgment in a specified sum for breach of the contract. *Hays v. Peavey*..... 78
2. PROCESS—SERVICE—SUBSTITUTED SERVICE. Under Bal. Code, § 4875, providing for a substituted service upon defendant "at the house of his usual abode," service upon a clerk at defendant's place of business is insufficient. *Hoffman v. Spokane Jobbers Association*... 179
3. PROCESS—SUMMONS FOR PUBLICATION—SUFFICIENCY. Under Laws 1897, p. 182, § 96, subd. 3, a summons by publication requiring the defendant to appear within sixty days after the "service" of the summons is not in accordance with the statute, and is insufficient to confer jurisdiction to enter a judgment of default. *Gould v. Stanton* 363
4. PROCESS—SUMMONS BY PUBLICATION—SUFFICIENCY. Under Laws 1897, p. 182, § 96, authorizing service of summons by publication directing the defendant to appear within sixty days after the date of the first publication, a summons requiring the defendant to appear within sixty days after the "service" of the summons is insufficient to confer jurisdiction to enter a default judgment. *Hays v. Peavey* 78

PROHIBITION:

1. PROHIBITION—ADEQUACY OF REMEDY AT LAW—LETTERS OF ADMINISTRATION. Prohibition lies to prevent the threatened issuance of let-

PROHIBITION—CONTINUED.

ters of general administration without jurisdiction, since there is no adequate remedy at law. *In re Guye's Estate*..... 264

2. **PROHIBITION—JURISDICTION—EFFECT OF STIPULATION.** Under Const., art. 4, § 4, and Bal. Code, § 5769, the supreme court has power to issue a writ of prohibition only to restrain the exercise of an unauthorized judicial or quasi judicial act, notwithstanding a stipulation of the parties to the application limiting the inquiry to the constitutionality of a specified statute. *State ex rel. Bennett v. Taylor* 150
3. **SAME—GROUNDS—NONJUDICIAL ACT OF SUPERIOR JUDGE—APPOINTMENT OF WATER COMMISSIONER.** Laws 1907, p. 285, § 1, authorizing the superior court, upon an ex parte application of the owner or manager of an irrigation reservoir for the storage of waters, to appoint a water commissioner to control and regulate the head gates in accordance with court decrees or the legal rights of interested owners, prescribes only ministerial or administrative duties, and not judicial or quasi judicial duties, and has no relation to judicial proceedings, where removal was the only power that the court could exercise over him; hence the supreme court has no jurisdiction to prevent the appointment by writ of prohibition. *State ex rel. Bennett v. Taylor*..... 150

PROPERTY:

Dedication to public use, see **DEDICATION**.

Taking for public use, see **EMINENT DOMAIN**.

Licenses in respect to real property, see **LICENSES**.

Nature of property liable to assessment for public improvements, see **MUNICIPAL CORPORATIONS**, 1.

PROXIMATE CAUSE:

Of injury to servant, see **MASTER AND SERVANT**, 7, 8, 11.

PUBLICATION:

Of process to sustain judgment, see **JUDGMENT**.

Service of process, see **PROCESS**.

Service of process in tax foreclosure proceedings, see **TAXATION**, 4, 5.

PUBLIC IMPROVEMENTS:

By cities, see **MUNICIPAL CORPORATIONS**.

PUBLIC LANDS:

Act authorizing sale for cemetery purposes as class legislation, see **CONSTITUTIONAL LAW**.

Right of railroad to condemn tide lands, see **EMINENT DOMAIN**, 2, 8, 15.

Mineral lands, see **MINES AND MINERALS**.

PUBLIC LANDS—CONTINUED.

Lands under water, see **NAVIGABLE WATERS**, 7-12, 14.

Appropriation of water rights, see **WATERS AND WATER COURSES**, 1, 3, 5, 6.

1. **PUBLIC LANDS—GRANTS—RAILROAD RIGHT OF WAY—TITLE ACQUIRED—STANDING TIMBER.** Act Cong., July 2, 1864, granting the Northern Pacific Railroad Company a four-hundred foot right of way across public lands, conveys a fee simple title, including the title to standing timber. *Northern Pac. R. Co. v. Myers-Parr Mill Co.* 447
2. **PUBLIC LANDS—SALE—CONTRACT—AUTHORITY OF COMMISSIONER.** Under Bal. Code, § 2198, giving the commissioner of public lands power to review and reconsider his official acts relating to public lands until a lease or contract has been executed and signed, the commissioner acts within his discretion in refusing to sign a contract for the sale of the whole of lots, where, pending the advertised sale, the legislature passed an act, which took effect after the sale, granting a city a right of way through the lots for a street. *State ex rel. Stirrat v. Ross*..... 481
3. **PUBLIC LANDS—SHORE LANDS—PREFERENCE RIGHT TO PURCHASE—LOTS ABUTTING ON LAKE FRONT STREET.** The purchaser of lots abutting on a street that reaches to high water mark on a lake, has the preference right to purchase the abutting shore lands, by virtue of his ownership of the fee of the entire street. *Gifford v. Horton*. 595
4. **SAME—STATUTE—CONSTRUCTION.** Laws 1897, p. 250, § 45, giving upland owners the preference right to purchase shore lands is a mere gratuity, and is not intended as in lieu of riparian rights. *Gifford v. Horton*..... 595
5. **PUBLIC LANDS—LANDS UNDER WATER—SHORE LINE—ESTABLISHMENT—LITTORAL RIGHTS.** Where the board of harbor line commissioners filed a plat fixing the shore line of a lake from 39½ to 139 feet distant from an adjacent city block, no part of the block abuts on the shore lands of the lake, and the line is conclusively fixed as to the owner of the block claiming a preference right to purchase shore lands, until vacated for error at the instance of the state or of a party in interest claiming that the shore line was located too far inland. *Williams v. Cole*..... 110
6. **SAME—RIGHT TO PURCHASE SHORE LANDS—ABUTTERS.** The right of an abutting owner to access to the street in front of his property gives him no right as an abutting owner to the shores of a lake across or bordering on the other side of the street. *Williams v. Cole* 110
7. **SAME—CONCLUSIVENESS—JUDGMENT—EXISTENCE OF STREET.** In such a case, the existence of a street between the block and the shore land is conclusively settled by a final judgment against the city in which the court finds that there is no street, and no appeal was taken therefrom by the city. *Williams v. Cole*..... 110

PUBLIC USE:

Dedication of property, see **DEDICATION**.

Taking property for public use, see **EMINENT DOMAIN**.

PUNISHMENT:

For criminal offenses in general, see **CRIMINAL LAW**, 14.

QUARRIES:

Injury to employee from fall of rock, see **MASTER AND SERVANT**, 5.

QUESTION FOR JURY:

Negligence of passenger in crossing trestle at invitation of carrier, see **CARRIERS**, 4.

In action for injuries to servant, see **MASTER AND SERVANT**, 2, 15, 16, 23, 25, 27-29.

Whether conditions causing obstruction of stream be deemed act of God, see **NAVIGABLE WATERS**, 6.

Negligence of person injured at railroad crossing, see **RAILROADS**, 3.

Contributory negligence of driver of wagon in collision with street car, see **STREET RAILROADS**.

QUIETING TITLE:

1. **QUIETING TITLE—TAX TITLE—CLOUD—WHAT CONSTITUTES.** In this state a tax judgment and deed may be set aside for patent as well as latent invalidity, as a cloud upon the title. *Cordiner v. Finch Investment Co.* 574
2. **QUIETING TITLE—TAXATION—RECOVERY OF LAND SOLD FOR TAXES—COMPLAINT—SUFFICIENCY.** In an action to quiet title, the complaint sets out the cloud upon the title with sufficient certainty, when it alleges that the defendants claim through void tax title proceedings, giving the court, the number, and title of the case, referring to the judgment and tax deed following, and describing particularly the summons and manner of serving, showing the entire proceeding to be void, all of which were matters of record. *Cordiner v. Finch Investment Co.* 574
3. **QUIETING TITLE—DEFENSES—PURCHASE OF DEBATABLE TITLE—ATTORNEYS—RIGHT TO SUE—CHAMPERTY.** In an action to remove the cloud of a void tax sale, it is no defense to allege that the plaintiff is an attorney at law and purchased a debatable title for an inadequate consideration for speculative purposes, and to foster litigation. *Cordiner v. Finch Investment Co.* 574
4. **QUIETING TITLE—LIMITATION OF ACTIONS—EXECUTION SALE—TITLE HELD IN TRUST.** An action to quiet title against an execution sale, under a revived judgment recovered twelve years previously against the holder of the record title, is not barred by the statute of limitations, where it appears that the judgment debtor held the title only

QUIETING TITLE—CONTINUED.

as a trustee for another, and acknowledged and executed the trust three years prior to execution sale, and that the plaintiff had been in possession ever since the execution of the trust and commenced action the year after the execution sale. *Denny v. Schwabacher* 689

RAILROADS:

Injuries to passengers, see **CARRIERS**.

Exercise of power of eminent domain, see **EMINENT DOMAIN**, 1-4, 8, 12-15.

Admissibility of declarations of train crew in action for personal injuries, see **EVIDENCE**, 2.

Injuries to employees, see **MASTER AND SERVANT**, 1, 2, 11, 15, 17-24, 27, 30.

Liability of franchise to assessment for public improvements, see **MUNICIPAL CORPORATIONS**, 1.

Right of state to lease harbor area for railroad purposes, see **NAVIGABLE WATERS**, 9.

Grants of land in aid, see **PUBLIC LANDS**, 1.

Injuries to persons on street railway tracks, see **STREET RAILROADS**.

Taxation of railroad property, see **TAXATION**, 1-3.

1. **RAILROADS—CROSSINGS—NEGLIGENCE—WARNING—EVIDENCE—SUFFICIENCY.** The evidence is sufficient to show negligence upon the part of a railroad company in switching cars at a public crossing where people were in the habit of crossing, when no warning was given by bell, whistle, or lookout on the freight car backed upon the crossing. *Grant v. Oregon Railroad & Nav. Co.*..... 678
2. **SAME—CONTRIBUTORY NEGLIGENCE—FAILURE TO LOOK AND LISTEN—ACTS IN EMERGENCY.** One run down at a railroad crossing is not guilty of contributory negligence as a matter of law, in going upon the track without stopping to look or listen, where she had just alighted from a buggy, her attention was diverted by the fright of the horses, and she involuntarily backed onto the track in an endeavor to get out of the way of the team. *Grant v. Oregon R. & Nav. Co.* 678
3. **SAME—QUESTION FOR JURY.** A woman is not guilty of contributory negligence, as a matter of law, in alighting from a buggy within six to ten feet from a railroad crossing in a place of safety, but so close that she was crowded onto the track by the fright of the horses, where there was no indication of an approaching train likely to frighten the horses, which were used to trains and ordinarily gentle. *Grant v. Oregon R. & Nav. Co.*..... 678

RAPE:

Competency of witnesses as to reputation of accused, see **CRIMINAL LAW**, 5.

REAL ESTATE AGENTS:

See **BROKERS**.

REAL PROPERTY:

Trespass on real property, see **TRESPASS**.

Conveyance, see **VENDOR AND PURCHASER**.

RECAPTURE:

Of waters turned into stream, see **WATERS AND WATER COURSES**, 5.

RECEIVERS:

Of corporations in general, see **CORPORATIONS**, 5.

RECITALS:

Presumptions from recitals in judgment, see **JUDGMENT**, 1, 2, 6.

RECORDS:

Transcript on appeal or writ of error, see **APPEAL AND ERROR**, 10, 11.

Transfer of corporate stock, see **CORPORATIONS**, 1, 2.

As evidence of rejection of claim against county, see **COUNTIES**, 3.

Of previous convictions to identify habitual criminal, see **CRIMINAL LAW**, 15-17.

Judicial notice of record in another cause, see **EVIDENCE**, 1.

REDEMPTION:

Recovery for improvements on land sold under void tax judgment, see **EJECTMENT**, 5.

From tax sale, see **TAXATION**, 6, 9, 11, 13.

REGISTRATION:

Transfer of stock on company's books, see **CORPORATIONS**, 1, 2.

REHEARING:

See **NEW TRIAL**.

After remand by appellate court, see **APPEAL AND ERROR**, 24.

REJECTION:

Of claim against county, see **COUNTIES**, 3, 4.

RELOCATION:

Of mining claims, see **MINES AND MINERALS**, 4.

REMAND:

Of cause on appeal, see **CRIMINAL LAW**, 13.

REMITTITUR:

Of damages as condition of denying motion for new trial, see **NEW TRIAL**, 4.

REPEAL:

Of statute, see **STATUTES**, 2.

REPLEVIN:

Confession of judgment by partner in replevin arising in tort, see **PARTNERSHIP**.

1. **REPLEVIN—PROCESS—SERVICE OF AFFIDAVIT.** In replevin, service of the affidavit is not sufficient service of process in lieu of the summons and complaint. *Hoffman v. Spokane Jobbers Association*.. 179
2. **REPLEVIN—ACCESSION—LOGS—CHANGE OF FORM—GOOD FAITH.** Replevin does not lie for the product of sawlogs cut into lumber and commingled by an innocent purchaser with its own property, without notice that the vendor had trespassed and cut the logs on plaintiff's land. *Meyers v. Gerhart*..... 657
3. **REPLEVIN — ACCESSION — LOGS — LOSS OF IDENTITY — LACHES OF OWNER.** Where the owner of converted logs stood by without making any claim until after they were manufactured into lumber and sold by an innocent purchaser, he cannot maintain replevin for the product, or for a like quantity of other product. *Meyers v. Gerhart* 657
4. **REPLEVIN—RELIEF—ISSUES—FATAL VARIANCE—CONVERSION.** An action of replevin must fail when the plaintiff fails to show that the property is wrongfully detained by the defendant, and incidental relief cannot be given upon showing a conversion, as that would be a fatal variance. *Meyers v. Gerhart*..... 657

REPRESENTATIONS:

Representation of corporations by officers or agents, see **CORPORATIONS**, 3.

False representations in sale of corporate stock, see **FRAUD**.

REPUTATION:

Of accused as evidence, see **CRIMINAL LAW**, 5.

REQUESTS:

For instructions in civil actions, see **TRIAL**, 7.

RESCISSION:

Cancellation of written instrument, see **CANCELLATION OF INSTRUMENTS**.

Of contract for sale of land, see **VENDOR AND PURCHASER**, 2, 3.

RESERVATION:

By plattons in dedicating street, see **DEDICATION**.

RES GESTAE:

In civil actions, see **EVIDENCE**, 2.

RES JUDICATA:

See JUDGMENT, 7, 8.

RESTRICTIONS:

In grant of water right, see WATERS AND WATER COURSES, 21.

REVENUE:

See TAXATION.

REVIEW:

By higher court on appeal for errors or irregularities, see APPEAL AND ERROR.

Statutory writ of review, see CERTIORARI.

In criminal prosecution, see CRIMINAL LAW, 13, 16.

Of condemnation proceedings, see EMINENT DOMAIN, 19-21.

REVOCATION:

Of license in respect of real property, see LICENSES.

RIPARIAN OWNERS:

Preferential right to purchase tide lands, see PUBLIC LANDS, 4.

RIPARIAN RIGHTS:

See NAVIGABLE WATERS, 10-14.

Damages for land taken by boom company, see EMINENT DOMAIN, 9-11.

Reasonable use of water, see WATERS AND WATER COURSES, 7, 8, 11-13.

RISKS:

Assumed by employee, see MASTER AND SERVANT, 12-14, 28.

ROBBERY:

Charging offense in language of statute, see INDICTMENT AND INFORMATION, 1.

1. ROBBERY — INFORMATION — ALLEGING RIGHT TO PROPERTY — SUFFICIENCY. An information for robbery charging the forcibly taking of the property of A from the immediate presence of B, without showing any connection between A and B or the right of B to control and dominion over the property, is insufficient to sustain a conviction. *State v. Hall*..... 142

SAFE PLACE TO WORK:

See MASTER AND SERVANT.

SALARY:

Of county officers, and increase during term, see COUNTIES, 2.

Mandamus to compel issuance of salary warrant, see MANDAMUS.

SALES:

Of corporate stock, see CORPORATIONS, 2.

Liquidated damages for breach of agency contract, see DAMAGES, 1.

Parol evidence to vary contract of sale, see EVIDENCE, 3-5.

On execution, see EXECUTION, 1, 3.

Of dangerous chemical and notice to purchaser, see EXPLOSIVES, 3, 4.

By factors, see FACTORS.

Effect of sale on insurance, see INSURANCE, 2.

Of intoxicating liquors, see INTOXICATING LIQUORS.

Execution sales, title of act, see STATUTES, 1.

Tax sales, see TAXATION, 4-13.

Of real property, see VENDOR AND PURCHASER.

1. SALES—FRAUD—EVIDENCE—ADMISSIBILITY. Upon the defense of fraudulent representations in the sale of a horse, made by the agent of the vendors, printed advertising cards given to the vendees at the time, showing the agent's name and describing the vendor's business and the value of its horses, are admissible as part of the representations. *Ireland v. Scharpenberg*..... 558
2. SALES—CONTRACT—PASSING OF TITLE. Upon the oral sale of a certain stack of hay, then upon the premises of the vendor, agreed to contain fifty and one-half tons, upon which \$250 was paid, the title to the hay passes at once to the vendee, who assumed the risk of loss, even though the vendor was entitled to retain possession of a portion to secure full payment of the price. *Lauder v. Johnston* 59
3. SAME. Upon a sale of "all merchantable" hay upon the vendor's premises, which was to be separated from unmerchantable hay and baled by the vendor, and to be paid for at the rate of ten dollars per ton as removed from the premises by the vendee, the title to the hay does not pass until it is separated and baled, and the vendee assumes the risk of loss of the baled portion only. *Lauder v. Johnston* 59

SEIZIN:

Covenants of seizin, see COVENANTS.

SEPARATE ESTATE:

Of married women, see HUSBAND AND WIFE.

SERVANTS:

See MASTER AND SERVANT.

SERVICE:

Of notice on attorney, see MOTIONS.

Of process, see PROCESS, 2.

Of process in replevin, see REPLEVIN, 1.

SET-OFF AND COUNTERCLAIM:

Right to urge as defense, see **FORCIBLE ENTRY AND DETAINER**, 1.

1. **SET-OFF AND COUNTERCLAIM—TORT IN ACTION ON CONTRACT.** In an action on contract to subject pledged property to a debt, a claim in tort for plaintiff's conversion of part of the property is not a proper item for counterclaim. *First National Bank of Wenatchee v. Fowler* 65

SETTLEMENT:

Of bill of exceptions or statement of facts, see **APPEAL AND ERROR**, 11.

SHORE LANDS:

Disposal of state tide and shore lands, see **PUBLIC LANDS**, 2-6.

SHORES:

Of navigable waters, see **NAVIGABLE WATERS**, 7, 8, 10-14.

SPECIFIC PERFORMANCE:

1. **SPECIFIC PERFORMANCE—FRAUDS, STATUTE OF—PART PERFORMANCE—EVIDENCE—SUFFICIENCY.** The taking of possession, making part payment, and the making of permanent improvements, entitles a son to specific performance of an agreement by his parents to deed him a tract of land in consideration of his paying off a mortgage thereon, where the contract is clearly established by clear and cogent proof. *Morgan v. Morgan*..... 406
2. **SPECIFIC PERFORMANCE—CONTRACT—ASSENT—AREA—EVIDENCE.** Where the minds of a vendor and vendee did not meet as to the exact tract of acreage intended to be bought and sold, the vendee cannot sue to recover additional acreage on evidence that would simply have entitled her to a rescission of the contract. *Windust v. Sutton* 340

SPRINGS:

Rights of owner of land to use of waters, see **WATERS AND WATER COURSES**, 2, 11.

STATEMENT OF FACTS:

See **APPEAL AND ERROR**, 11.

STATES:

Grant of lands under navigable streams, see **NAVIGABLE WATERS**, 8.
Public lands, see **PUBLIC LANDS**, 2-7.

STATUTES:

See **FRAUDS, STATUTE OF.**
Construction of statute authorizing deficiency judgment, see **CHATTEL MORTGAGES**, 2.
Granting special privileges or immunities, see **CONSTITUTIONAL LAW.**

STATUTES—CONTINUED.

Validity of habitual criminal statute, see **CRIMINAL LAW**, 14, 16.

Improvements in ejectment, see **EJECTMENT**, 5.

Charging offense in language of statute, see **INDICTMENT AND INFORMATION**, 1.

Statutes of limitation, see **LIMITATION OF ACTIONS**.

Construction of law requiring safeguarding of machinery, see **MASTER AND SERVANT**, 6.

Construction of statute relating to relocation of forfeited claim, see **MINES AND MINERALS**, 4.

Rights and liabilities of sureties, see **PRINCIPAL AND SURETY**, 2.

Preference right to purchase shore lands, see **PUBLIC LANDS**, 4.

Timber on public lands, see **PUBLIC LANDS**, 1.

Use and control of waters of springs, see **WATERS AND WATER COURSES**, 2, 11.

1. **STATUTES—TITLE—SUBJECT—SUFFICIENCY—MORTGAGES—DEFICIENCY JUDGMENTS—SALES UNDER EXECUTION.** The title to an act relating to sales under execution and orders of sale and the confirmation of sheriff's sales and redemption therefrom, is not sufficiently broad to include the subject-matter of Laws 1899, p. 85, § 2, which provides for or against the taking of deficiency judgments in an action to foreclose a mortgage when consented to in the agreement, or when stipulated against in the mortgage, as the case may be, and that the commencement of an independent action shall be a waiver of the mortgage security. *Bradley Engineering and Machinery Co. v. Muzzy* 227
2. **STATUTES—IMPLIED REPEAL.** A new law covering the whole subject-matter of an old one repeals the latter by implication, although not necessarily inconsistent in some matters. *Bradley Engineering and Machinery Co. v. Muzzy*..... 227

STAY:

Of action, see **ACTION**, 2.

Pending appeal or writ of error, see **APPEAL AND ERROR**, 9.

STIPULATIONS:

In contracts as to liquidated damages or penalties, see **DAMAGES**, 1.

Effect of on jurisdiction to issue writ of prohibition, see **PROHIBITION**, 2.

1. **STIPULATIONS—CONSTRUCTION.** A stipulation that the issues in consolidated actions may be submitted upon their merits, on the pleadings in the several actions, which were to be considered as evidence, and the evidence submitted under the stipulations, should not be construed as a confession of judgment on a cross-complaint to which no answer was made, or as an admission of the relevancy of the pleadings, or as an estoppel to assert legal conclusions from the pleadings considered as a whole. *First National Bank of Wenatchee v. Fowler*..... 65

STOCK:

Corporate stock, see CORPORATIONS, 1, 2.

STOCKHOLDERS:

Extent of stockholders' liability for corporate debts on subscriptions, see CORPORATIONS, 2.

STREET RAILROADS:

Injuries to passengers, see CARRIERS.

Inadequate and excessive damages, see DAMAGES, 4, 5.

Liability of franchise to assessment for local improvement, see MUNICIPAL CORPORATIONS, 1.

1. STREET RAILWAYS—COLLISION WITH WAGON—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. In an action for injuries sustained by the driver of an express wagon in a collision with a street car in the business district of a large city, the plaintiff is not guilty of contributory negligence, as a matter of law, in assuming that he can cross the street car tracks in safety, where it appears that before crossing he looked back and saw the street car half a block away, approaching on an up grade, at ordinary speed, and the fender of the car struck one of the rear wheels of the wagon, the motorman not having slackened the speed of the car. *Snowdell v. Seattle Electric Co.* 323

STREETS:

Dedication, see DEDICATION.

Condemnation of lands for, see EMINENT DOMAIN, 4, 6, 16.

Liability of contractor for acts of assignee of contract in grading street, see EXPLOSIVES, 1.

Injury to traveler on county road, see HIGHWAYS.

SUBSCRIPTION:

To corporate stock, see CORPORATIONS, 2.

SUBSTITUTED SERVICE:

See PROCESS, 2.

SUMMONS:

See PROCESS.

Service by publication, see JUDGMENT.

SUPERSEDEAS:

On appeal or writ of error, see APPEAL AND ERROR, 9.

SUPPLEMENTARY PROCEEDINGS:

On execution, see EXECUTION, 4.

SURETYSHIP:

See PRINCIPAL AND SURETY.

SURFACE WATERS:

See **WATERS AND WATER COURSES**, 1, 2, 7, 11.

SURRENDER:

Of premises to third person pending action, see **FORCIBLE ENTRY AND DETAINER**, 3.

SWAMPS:

Riparian rights to waters of swamp or marsh, see **WATERS AND WATER COURSES**, 7.

Right to percolation from artificial swamps, see **WATERS AND WATER COURSES**, 1.

TAXATION:

Interlineation in public record of tax deed, see **ALTERATION OF INSTRUMENTS**.

Right to improvements in action to recover land sold under void tax judgment, see **EJECTMENT**, 5.

Failure of deed to describe property as failure of plaintiff's title, see **EJECTMENT**, 1.

Laches in bringing action to vacate tax judgment, see **EQUITY**.

Liquor licenses, see **INTOXICATING LIQUORS**, 1, 2.

Presumptions as to due service of process in action to vacate default judgment, see **JUDGMENT**, 1, 2.

Assessments for municipal improvements, see **MUNICIPAL CORPORATIONS**, 1-3.

Void tax judgment and deed as cloud on title, see **QUIETING TITLE**, 1, 2.

1. **TAXATION—ASSESSMENT—REVIEW—DISCRETION.** In the absence of fraud, the courts cannot review the discretion of the tax commission in determining the amount at which different classes of railroad track shall be assessed. *Great Northern R. Co. v. Snohomish County* 23
2. **SAME—TAX COMMISSION—POWERS—RAILROAD PROPERTY.** A determination by the tax commission as to the amount to be assessed against railroad tracks being binding upon county assessors, it is immaterial that the commissioners viewed their powers as only advisory. *Great Northern R. Co. v. Snohomish County*..... 23
3. **SAME.** The law making it the duty of the tax commissioners to classify railroad property and superintend its assessment, instructions sent out to all assessors fixing the assessment on different classes of railroad track and rolling stock will be presumed to have been sent in conformity to the law, and are binding upon the county assessors; and a larger assessment by an assessor is void, notwithstanding he honestly endeavored to assess it at sixty per cent of its value, uniformly with other property in the county. *Great Northern R. Co. v. Snohomish County*..... 23

TAXATION—CONTINUED.

4. TAXATION—FORECLOSURE—PROCESS—SUMMONS—DEFECTS. The failure of a summons in a tax foreclosure to properly describe the property, as required by Bal. Code, § 1751, vitiates the tax judgment and sale, as the statute must be strictly pursued to obtain jurisdiction. *Wick v. Rea*..... 424
5. TAXATION—FORECLOSURE—SUMMONS FOR PUBLICATION—SUFFICIENCY. Under Laws 1897, p. 182, § 96, subd. 3, a summons by publication requiring the defendant to appear within sixty days after the "service" of the summons is not in accordance with the statute, and is insufficient to confer jurisdiction to enter a judgment of default. *Gould v. White*..... 394
6. TAXATION—REDEMPTION—LACHES—ACTIONS. The neglect of a party to pay taxes for many years does not amount to laches that would bar an action to redeem the property within the statutory period. *Gould v. White*..... 394
7. TAXATION—RECOVERY OF LAND—TENDER—PLEADING. In an action to set aside a tax title, an allegation of the tender of all taxes paid, in the language of the statute, is sufficiently definite without stating the amount of the tender. *Cordner v. Finch Investment Co.*... 574
8. SAME—FAILURE TO DENY TENDER—WAIVER OF LIEN—APPEAL—REVIEW. Where, in an action to set aside a void tax sale, the defendant failed to deny an allegation that the plaintiff tendered all taxes, penalties, interest, and costs paid at the sale, he cannot on appeal claim insufficiency of the amount of the tender; and by failing to assert a lien for the taxes paid, he waives the same. *Cordner v. Finch Investment Co.* 574
9. TAXATION—REDEMPTION—ACTIONS—CONDITION PRECEDENT—TENDER OF TAX—WAIVER. In an action to recover lands sold under void tax foreclosure proceedings, a tender of the amount paid out for taxes, as a condition precedent to the action, is waived where defendants refused an insufficient tender and asserted title and absolute ownership, showing that any tender would have been ineffectual. *Gould v. Stanton* 363
10. SAME—WAIVER OF TENDER. A tender of the tax as a condition precedent to an action to set aside a void tax judgment is not necessary if it was waived. *Gould v. White*..... 394
11. TAXATION—REDEMPTION—TENDER OF TAX—WAIVER. Taxes may be redeemed at any time before a valid tax deed is issued, and insufficiency of the tender therefor is immaterial where the tax title holder refused to consider a tender unless another outside claim was also paid. *Stockand v. Hall*..... 106
12. TAXATION—FORECLOSURE—PARTIES—ACTION TO SET ASIDE—COMPLAINT—SUFFICIENCY. Under the statute, a tax foreclosure proceeding against community real property need not be brought against

TAXATION—CONTINUED.

both husband and wife; and a complaint by a wife to set aside such a foreclosure for want of service on the husband does not state a cause of action where it fails to affirmatively show want of service upon the person whose name appears on the assessment roll as the owner. *French v. Taylor*..... 624

13. SAME—ACTION TO REDEEM—DEFENSES. That there was no defense to a tax foreclosure is not bar to an action to set aside a void tax judgment, the statute requiring only a tender of the tax. *Gould v. White* 394

TAX COMMISSION:

Power to assess railroad property, see **TAXATION**, 1-3.

TENDER:

Of taxes on redemption, see **TAXATION**, 9, 11, 13.

Of taxes as condition precedent to attack on tax title, see **TAXATION**, 7-10, 12, 13.

TIDE LANDS:

See **NAVIGABLE WATERS**, 7-12, 14.

Condemnation by railroad, see **EMINENT DOMAIN**, 2, 8, 15.

Disposal of state tide lands, see **PUBLIC LANDS**, 2-6.

TIMBER:

Title to standing timber included in grant to railroad, see **PUBLIC LANDS**, 1.

Trespass in cutting standing timber, see **TRESPASS**.

TIME:

Of commencement of action, see **ACTION**, 2.

Of alteration of instrument, see **ALTERATION OF INSTRUMENTS**, 1.

Application for continuance, see **CONTINUANCE**.

TITLE:

Operation and effect of dedication, see **DEDICATION**.

To maintain ejectment, see **EJECTMENT**, 1.

Avoidance of insurance policy for change in interest, title or possession of subject of insurance, see **INSURANCE**, 2.

To mineral location, see **MINES AND MINERALS**, 1, 5, 6.

Beds of navigable waters, see **NAVIGABLE WATERS**, 7-12.

Acquired to standing timber by railroad grant, see **PUBLIC LANDS**, 1.

Removal of cloud, see **QUIETING TITLE**.

Transfer of title on sale of goods, see **SALES**, 2, 3.

Of statutes, see **STATUTES**, 1.

To support action of trespass, see **TRESPASS**, 1.

TORTS:

- See **FORCIBLE ENTRY AND DETAINER; FRAUD.**
- Joinder of actions in tort, see **ACTION, 1.**
- Injuries for defects in bridges, see **BRIDGES.**
- In carriage of passengers, see **CARRIERS.**
- Damages, inadequate or excessive, see **DAMAGES, 4, 5.**
- Measure of damages, see **DAMAGES, 2.**
- Damages for incidental torts, see **EJECTMENT, 2.**
- Injuries from explosives, see **EXPLOSIVES.**
- Injuries caused by defects or obstructions in road, see **HIGHWAYS.**
- Civil damages from sale of liquors, see **INTOXICATING LIQUORS, 3.**
- Right of partners to confess judgment in tort, see **PARTNERSHIP.**
- Setting up claim for tort in action on contract, see **SET-OFF AND COUNTERCLAIM.**
- Injuries caused by operation of street cars, see **STREET RAILROADS.**
- Obstruction and detention of irrigating ditch, see **WATERS AND WATER COURSES, 9, 10.**

TRANSFER:

- Of corporate shares, see **CORPORATIONS, 1, 2.**

TREBLE DAMAGES:

- For trespass, see **TRESPASS.**

TRESPASS:

1. **TRESPASS—CUTTING TIMBER—EVIDENCE—SUFFICIENCY.** In an action for damages for cutting timber on the defendant's land, judgment is properly directed for plaintiff, where its title indisputably appears and defendant cut the timber without plaintiff's consent. *Northern Pac. R. Co. v. Myers-Parr Mill Co.*..... 447
2. **TRESPASS—CUTTING STANDING TIMBER—ACTIONS—TREBLE DAMAGES.** An action for the wrongful and willful cutting of timber on the land of another, the complaint praying for treble damages, is an action in tort, under Bal. Code, §§ 5656, 5657, upon which treble damages may be awarded. *Northern Pac. R. Co. v. Myers-Parr Mill Co.*.. 447
3. **SAME—SPECIAL FINDINGS OF JURY.** In an action for trespass in cutting standing timber, treble damages should be awarded as provided by Bal. Code, § 5656, where there was no claim by defendant, pursuant to *Id.*, § 5657, that the trespass was casual or involuntary, and the jury found specially that the defendant had no probable cause to believe that the land was its own, and might, by the exercise of ordinary care, have ascertained that it belonged to the plaintiff. *Northern Pac. R. Co. v. Myers-Parr Mill Co.*..... 447
4. **SAME—VERDICT—INTERROGATORIES.** Under Bal. Code, § 5657, limiting the recovery for timber cut on the land of another to single damages in case the trespass was casual or involuntary or if the defendant had probable cause to believe that the land was his own,

TRESPASS—CONTINUED.

an interrogatory submitted to the jury as to whether defendant had reasonable cause to believe the "land" was his own is in substantial compliance with the statute, and not prejudicial error, although the defendant claimed to own only the timber and not the land. *Northern Pac. R. Co. v. Myers-Parr Mill Co.*..... 447

TRIAL:

Necessity for exceptions or objections in lower court, see APPEAL AND ERROR, 3-7, 10, 23.

Review of rulings as dependent on presentation of same by record, see APPEAL AND ERROR, 11.

Review of findings in trial by court, see APPEAL AND ERROR, 14.

Review of rulings as dependent on prejudicial nature of error, see APPEAL AND ERROR, 17-22.

Continuance in civil actions, see CONTINUANCE.

In criminal prosecutions, see CRIMINAL LAW.

Instructions as to items and measure of damages, see DAMAGES, 2, 6.

Instructions as to intoxication and negligence of person injured by explosion, see EXPLOSIVES, 2.

Right to trial by jury, see JURY, 1.

Drawing jury, see JURY, 2.

Competency of and challenge to jurors, see JURY, 3.

Instructions as to joint liability for obstructing stream, see NAVIGABLE WATERS, 4.

Manner of arriving at verdict as ground for new trial, see NEW TRIAL, 3.

Erroneous instructions ground for new trial, see NEW TRIAL, 2.

Misconduct of counsel ground for new trial, see NEW TRIAL, 1.

Stipulation as affecting rights and privileges at trial, see STIPULATIONS.

Submission to jury of interrogatories as to casual or involuntary trespass, see TRESPASS, 4.

1. TRIAL—ORDER OF PROOF—DISCRETION. In an action by a stockholder of a corporation for fraud, requiring the plaintiff to first establish his ownership of stock relates only to the order of proof, and is within the discretion of the trial judge. *Van Horn v. New Western Shingle Co.*..... 117

2. TRIAL — ARGUMENT — OBJECTIONS — APPEAL — PRESERVATION OF GROUNDS. It cannot be claimed that the court refused to allow argument to the jury on the value of timber, upon taking the other issues from the jury, by reason of the statement of the court that the only matter counsel could discuss was as to the amount of the timber cut and as to whether plaintiff was entitled to treble damages, there being no request made to permit discussion of the value, or any attempt to do so. *Northern Pac. R. Co. v. Myers-Parr Mill Co.* 447

TRIAL—CONTINUED.

3. **TRIAL—MOTIONS—WAIVER OF JURY—APPEAL—DECISION WITHOUT REMAND.** Where, at the close of plaintiff's case, the defendant moves to discharge the jury and for judgment, and plaintiff moves for a directed verdict, the parties waive a verdict, and authorize judgment by the court; and upon reversing judgment for the defendant, the supreme court will enter judgment for plaintiff without remand for a new trial. *Easterly v. Mills*..... 356
4. **TRIAL—INSTRUCTIONS.** It is not error to state that the evidence is conflicting when that is the fact. *Bush v. Independent Mill Co.* 212
5. **TRIAL—INSTRUCTIONS—BURDEN OF PROOF.** An instruction as to the burden of proof is correct when it defined the same as requiring a party to establish the fact to the satisfaction of the jury by a fair preponderance of the evidence. *Bush v. Independent Mill Co.*... 212
6. **TRIAL—INSTRUCTIONS IN WRITING.** Where it does not appear that a stenographic report of instructions to the jury was made under a private contract with a party, it will be assumed, in the absence of anything in the record to the contrary, that the stenographer was under the direction and control of the court, thereby constituting the instructions a charge in writing, within the meaning of Laws 1903, p. 119, § 1. *State v. Erickson*..... 472
7. **SAME.** It is not error to refuse instructions covered in the general charge. *Bush v. Independent Mill Co.*..... 212
Spencer v. Arlington 259
Conrad v. Graham & Co...... 641
8. **TRIAL—FINDINGS—NECESSITY—DISMISSAL AND NONSUIT.** Upon trial of an action at law before the court, findings of fact are not necessary to support a judgment of nonsuit, granted for failure of plaintiff to prove sufficient facts, under Bal. Code, § 5029, requiring findings by the court on an issue of fact; since the court merely decided the insufficiency of the evidence as a matter of law. *Broderius v. Anderson* 591

TROVER AND CONVERSION:

Recovery of sawlogs after change of identity and form, see REPLEVIN, 2-4.

1. **TROVER AND CONVERSION—FACTORS—REFUSAL TO RETURN GOODS HELD ON CONSIGNMENT.** Where the consignee refuses to return unsold goods, held for sale on consignment, "free on board cars consigned to the consignor" as required by the contract, the latter may treat such refusal as a conversion and recover the value. *Passow & Sons v. Kirkwood Distillery Co.*..... 196

TRUSTS:

Conveyance of wife's property to husband in trust, see **HUSBAND AND WIFE**, 3.

Competency of wife to testify to trust relation with deceased husband, see **WITNESSES**, 2.

1. **TRUSTS — GIFTS — HUSBAND AND WIFE—PRESUMPTIONS—EVIDENCE.**
The presumption that property paid for from a wife's separate estate and deeded to the husband is a gift can only be overcome by clear, cogent and convincing evidence establishing the trust relation. *Denny v. Schwabacher*..... 689

ULTRA VIRES:

Acts and contracts of city, see **MUNICIPAL CORPORATIONS**, 7.

UNDUE INFLUENCE:

As ground for cancellation of instruments, see **CANCELLATION OF INSTRUMENTS**.

UNITED STATES:

Public lands, see **PUBLIC LANDS**, 1.

UNLAWFUL DETAINER:

See **FORCIBLE ENTRY AND DETAINER**.

VACATION:

Of judgment as cessation of controversy, see **APPEAL AND ERROR**, 1.

Of divorce decree, see **DIVORCE**.

Of judgment by default, see **JUDGMENT**, 1, 2, 4, 5.

Of tax deed and judgment as cloud on title, see **QUIETING TITLE**, 1, 2.

Of tax judgment or sale, see **TAXATION**, 7-10, 12, 13.

VALUE:

Of land appropriated for public use as measure of compensation, see **EMINENT DOMAIN**, 8-11.

Determination of value of property for purpose of taxation, see **TAXATION**, 1-3.

VARIANCE:

Materiality of in descriptions in location notices, see **MINES AND MINERALS**, 3.

Between pleading and proof in civil actions, see **PLEADING**, 2, 3.

In action of replevin, see **REPLEVIN**, 4.

VENDOR AND PURCHASER:

Compensation of broker procuring conveyance, see **BROKERS**, 3, 4.

Sale of public lands as granting special privileges, see **CONSTITUTIONAL LAW**.

Rights of purchaser of lots abutting on street dedicated along lake shore, see **DEDICATION**.

VENDOR AND PURCHASER—CONTINUED.

Purchasers at sale on execution, see **EXECUTION**, 3.

Memoranda of sale sufficient to satisfy statute of frauds, see **FRAUDS, STATUTE OF**.

Conveyances to, by or between husband and wife, see **HUSBAND AND WIFE**, 2-4.

Effect of administrator's sale of insured property, see **INSURANCE**, 2.

Notice of fraud to servant as binding vendee, see **PRINCIPAL AND AGENT**.

Sale of state lands, see **PUBLIC LANDS**, 2-4, 6.

Transfers of ownership of personal property, see **SALES**.

Specific performance of contract, see **SPECIFIC PERFORMANCE**.

1. **VENDOR AND PURCHASER—FRAUD OF VENDOR—FALSE REPRESENTATIONS—CAVEAT EMPTOR.** The principal of *caveat emptor* does not apply, and it is error to grant a nonsuit in an action by a vendee for damages by reason of false representations, where it appears that the defendants represented that the sixty acres of land sold was so situated that it could all be irrigated by gravity from their canal; that over 28 acres was above the level of the canal and could not be so irrigated, which fact could only be ascertained by an accurate survey and was known to defendants, who had made the survey, and was unknown to the plaintiff; the modern tendency being to restrict the doctrine of *caveat emptor* which has no application if facts are peculiarly within the other party's knowledge, although not exclusively so; such representations being actionable or at least making a case for the jury. *Woody v. Benton Water Co.*..... 124
2. **VENDOR AND PURCHASER—RESCISSION BY VENDOR—FRAUD—NEGLIGENCE OF VENDOR—LACHES—EVIDENCE—SUFFICIENCY.** In an action to rescind a sale and trade of lands for money and stock in a corporation, for fraud in representing the financial standing of the company and the value of its rights, the evidence shows that the plaintiff was guilty of negligence and laches, precluding any recovery, where it appears that he was a competent business man and prominent in the community, that he consummated the trade relying upon promises that had not been fulfilled for such length of time as to have put him on inquiry, and thereafter, and while a stockholder, induced sales of treasury stock, and took no steps to rescind the sale for more than a year after the financial condition of the company was made public; especially where the property was of a speculative value and other's rights had become involved; and the same would be true of a co-plaintiff, a son, acting upon his father's advice. *Romaine v. Excelsior Carbide & Gas Machine Co.*..... 41
3. **VENDOR AND PURCHASER—CONTRACT—CONSTRUCTION—INDEPENDENT COVENANTS—RESCISSION—FORFEITURE.** An agreement by the vendor, contained in a contract for the sale of land, to furnish water from its ditches at \$1.50 per acre per year, commencing at a time in the future, is an independent covenant, and defaults in payment due on

VENDOR AND PURCHASER—CONTINUED.

the purchase price entitle the vendor to a rescission, upon the thirty days' notice stipulated for, without a showing that the water had been furnished; especially where the independent nature of the covenants is shown by the fact that the defaults occurred before the time had arrived to furnish water. *Spokane Canal Co. v. Coffman* 645

4. **VENDOR AND PURCHASER—REMEDIES OF VENDEE—DAMAGES—DEFICIENCY IN AREA—ACCEPTANCE OF DEED.** A vendee can recover damages for a deficiency in the area of land conveyed, where the contract of purchase called for sixty acres of land out of a larger tract owned by the vendors, without other description; and mere acceptance of a deed conveying an irregular tract by metes and bounds does not bar a recovery, as the vendee could assume that it conveyed the quantity called for. *Woody v. Benton Water Co.*..... 124
5. **VENDOR AND PURCHASER — REMEDIES OF VENDEE — DAMAGES FOR FALSE REPRESENTATIONS.** A vendee induced to purchase land by false representations made by the vendor's agents in pointing out the boundaries, may recover his damages from the agents, although the representations were not known to be false nor wilfully made. *West v. Carter*..... 236
6. **SAME—REPRESENTATIONS BY AGENTS—WHEN ACTIONABLE.** Representations by agents in the sale of land as to the owner's representations regarding his boundaries, constitute actionable fraud on the part of the agents, where the boundaries are thereby falsely described to the purchaser, to his damage, and the agents schemed to prevent the parties from coming together. *West v. Carter*..... 236
7. **SAME—MEASURE OF DAMAGES.** The measure of damages for false representations as to the boundaries of lands sold, where the vendees elect to keep the property, is the difference between the actual value of the property transferred at the time of the sale, and what the value would have been if the representations had been true, giving the vendees the benefit of their bargain. *West v. Carter*..... 236

VENUE:

Against corporations, see **CORPORATIONS**, 4.

VERDICT:

Review on appeal or writ of error, see **APPEAL AND ERROR**, 15, 16.

Impeachment by affidavit of juror, see **CRIMINAL LAW**, 7, 10.

Operation and effect as curing defects in pleading, see **INDICTMENT AND INFORMATION**, 2.

Verdict in favor of servant as exonerating master, see **MASTER AND SERVANT**, 30.

Directing verdict in civil actions, see **TRIAL**, 3.

WAIVER:

See **ESTOPPEL**.

Of forfeiture clause in bond providing for payment of note, see **BILLS AND NOTES**, 1.

Of entry on books of transfer of stock, see **CORPORATIONS**, 1.

Of conditions precedent to condemnation by railroad, see **EMINENT DOMAIN**, 12, 13.

Of exemption by husband's mortgage on personal property, see **HUSBAND AND WIFE**, 4.

Of forfeiture provision in policy by agent, see **INSURANCE**, 3.

Jury trial, see **JURY**, 1.

Of objections to variance, see **PLEADING**, 3.

Of tender of taxes, see **TAXATION**, 9-11.

Of lien for taxes paid, see **TAXATION**, 8.

Of verdict and judgment by court, see **TRIAL**, 3.

WARNING:

Duty to warn servant of starting of machinery, see **MASTER AND SERVANT**, 10.

WATERS AND WATER COURSES:

Use under parol license as conferring rights in realty by estoppel, see **ESTOPPEL**, 1.

Issuance of bonds in payment of unauthorized contract to purchase water works, see **MUNICIPAL CORPORATIONS**, 7-9.

Restraining appointment of water commissioner by superior judge, see **PROHIBITION**, 3.

Waters capable of navigation as public highways, see **NAVIGABLE WATERS**.

1. **WATERS—IRRIGATION—APPROPRIATION — AUGMENTED FLOW — PERCOLATION FROM ARTIFICIAL SWAMPS.** Waters appropriated from another watershed for irrigation, and discharged upon the owner's land, forming swamps and accumulations which percolate to and artificially augment the waters of another stream, may be impounded and used by the appropriators as their property, before it leaves their lands, as against a prior appropriator on the augmented stream. *Miller v. Wheeler*..... 429
2. **SAME — SPRINGS — STATUTES — CONSTRUCTION.** Bal. Code, § 4114, providing that a person upon whose lands seepage or spring water first arises shall have the prior right to its use, if capable of being used thereon, has no application to fountain heads of water courses which have been appropriated by others. *Miller v. Wheeler*.... 429
3. **SAME—ARTIFICIAL FLOW CONVEYED BY NATURAL WATER COURSE.** Waters appropriated from another watershed for irrigation may be turned into and conveyed by a natural water course without becoming subject to the use of others, and is not lost to the appropriators by reason of the loss of identity. *Miller v. Wheeler*..... 429

WATERS AND WATER COURSES—CONTINUED.

4. SAME—ABANDONMENT—INTENT—EVIDENCE—SUFFICIENCY. In such a case, intent to abandon such surplus waters is not shown by the fact that the surplus was allowed to run into a natural waterway, when it appears that contracts were made with reference to the use of the accumulated waters after the swamps developed, and the water was actually used for eleven years, and made the subject of conveyance. *Miller v. Wheeler*..... 429
5. SAME—RECAPTURE OF WATERS TURNED INTO STREAM—AMOUNT. Where impounded waters were allowed to flow off the owner's land into a water course with intent to recapture it below, no more can be taken out than was allowed to flow in, as against prior appropriation of the flow of the stream, after making due allowance for waste. *Miller v. Wheeler*..... 429
6. SAME—INTERFERENCE WITH TRIBUTARIES. In such a case, in reclaiming the impounded water, the owner cannot cut off any original sources or tributary springs so as to diminish the perennial flow already appropriated. *Miller v. Wheeler*..... 429
7. WATERS—RIPARIAN RIGHT—MARSH OR SWAMP. Riparian rights cannot be asserted to the flow of surplus waters of a swamp or marsh which has no outlet, and where there is no natural stream or waterway. *Hayward v. Mason*..... 653
8. SAME—EXTENT OF RIGHTS—PRIORITY. A riparian right to the flow of water is subject to a reasonable use for domestic and agricultural purposes by a prior riparian owner. *Hayward v. Mason*..... 653
9. SAME—IRRIGATING DITCH—OBSTRUCTIONS—DAMAGES. The grantee of an easement for an irrigating ditch cannot recover for loss of crops by reason of obstructions placed in the ditch by the grantor, where all the water the grantee was entitled to was allowed to flow past the obstructions. *Hayward v. Mason*..... 649
10. SAME—IRRIGATING DITCH—OBSTRUCTIONS—DAMAGES. The grantee of land with appurtenant water rights cannot recover damages to crops by reason of the grantor's obstructions and diminution of the water supply, when the volume was not reduced below what it was at the time the deed was given. *Hayward v. Mason*..... 653
11. WATERS AND WATER COURSES—SPRINGS—RIPARIAN RIGHTS—STATUTES—CONSTRUCTION. Bal. Code, § 4114, giving the owner of land the use of waters from springs thereon, provided he can use them on his own premises, has no application to springs having sufficient flow to form water courses, and the common law rule governs riparian rights on such a water course. *Hollett v. Davis*..... 326
12. SAME—RIGHTS BY PRESCRIPTION—USE FOR STATUTORY PERIOD. A prescriptive right to the use of water for irrigation purposes, diverted from its natural channel by an upper proprietor, is not acquired by a lower proprietor, where he and his predecessors in in-

WATERS AND WATER COURSES—CONTINUED.

- terest used the water for domestic and culinary purposes for five years, then for two years used it for watering stock, and then for eight years constantly used the water for the purposes of irrigation. *Hollett v. Davis*..... 326
13. SAME—DIVERTED WATERS—RIGHT TO RE-DIVERT—ESTOPPEL. An upper proprietor, by the diversion of a natural water course into another channel or creek for the period of thirty years, is estopped from preventing the flow of the waters in its new course, where it appears that during such time lower proprietors had acquired title and made valuable improvements bordering upon the creek relying on the flow of water for irrigation, and that without such irrigation their lands would be valueless, although their use had not been for the statutory prescriptive period. *Hollett v. Davis*..... 326
14. SAME—IRRIGATION—DIVERSION OF WATERS. In an action to prevent the diversion of waters used for irrigation, the court cannot make a division of the waters between the upper and lower proprietors where there is no evidence as to the proportion to which each was entitled. *Hollett v. Davis*..... 326
15. SAME—SURPLUS WATERS—PERMISSIVE USE—PRESCRIPTION. A permissive use of the surplus of appropriated waters will not ripen into rights by prescription, or under the statute of limitations, as the use must be adverse. *Miller v. Wheeler*..... 429
16. WATERS AND WATER COURSES—PRESCRIPTION—ADVERSE USER. No prescriptive right is acquired under a permission to use water by tapping a water company's line on the lands of a third person, the user paying therefor by keeping a dam in repair; since the user of the water was not a proprietor, and the use was permissive and not hostile. *Rhoades v. Barnes*..... 145
17. SAME—LAPSE OF TIME—INTERRUPTION OF USER. The initiation in 1898 of a prescriptive right to take water from a pipe on the lands of another, is prevented from ripening by the acts of the owner in 1905, claiming the water and stopping the flow. *Rhoades v. Barnes* 145
18. WATERS AND WATER COURSES—IRRIGATION—GRANTS—CONSTRUCTION—EASEMENTS. A deed granting "the right of way for a water ditch" across certain lands "to carry water for irrigating purposes," with the right of ingress and egress to keep the ditch in repair, creates an easement only. *Hayward v. Mason*..... 649
19. SAME—RIGHTS CONVEYED. The grant of a right of way for a ditch to carry water for irrigation does not prevent the grantor from using the same ditch without interfering with the grantee's use, where the grant does not appear to be exclusive, and the ditch had theretofore been used in common. *Hayward v. Mason*..... 649
20. WATERS AND WATER COURSES—DRAINAGE—GRANTS—EASEMENTS—RIGHTS OF GRANTOR. A deed conveying a right of way for a drainage ditch along a line as at present laid out to drain off surplus water

WATERS AND WATER COURSES—CONTINUED.

onto the grantor's land, with the right of ingress and egress to keep the ditch in repair, creates an easement only; but gives the grantor no right to control the drainage. *Hayward v. Mason*..... 653

21. **SAME—GRANTS—RESTRICTIONS.** A grant by a water company to erect a dam and take water through a four and one-half inch pipe at any point in a creek across the grantor's lands, does not authorize the use of an eight-inch pipe, nor a change in the location of the dam after several years' use, the grantee being bound by its first location. *Rhoades v. Barnes*..... 145

WILLS:

Disposition of community property and administration of, see **EXECUTORS AND ADMINISTRATORS.**

WITNESSES:

See **DEPOSITIONS.**

Competency of testimony as to reputation of accused, see **CRIMINAL LAW, 5.**

Indorsement of witnesses on information, see **CRIMINAL LAW, 6.**

Comments and remarks of trial judge, see **CRIMINAL LAW, 8.**

1. **WITNESSES—PRIVILEGE—HUSBAND AND WIFE—COMMUNITY DEBT.** Bal. Code, § 5994, providing that a husband shall not testify against a wife without her consent, has no application to supplemental proceedings on a judgment for the community debt of the husband and wife. *Belknap v. Platter*..... 1
2. **WITNESSES—TRANSACTION WITH PERSON SINCE DECEASED—INTEREST OF WIFE.** A wife is competent to testify as to the trust relation that had existed between herself and her deceased husband, as to property since conveyed by her, where she files a disclaimer of any interest, notwithstanding the allegation of the objecting party that she was interested in the property. *Denny v. Schwabacher*..... 689

WOODS AND FORESTS:

Title to standing timber by grant to railroad, see **PUBLIC LANDS, 1.**

Wrongful cutting of standing timber, see **TRESPASS.**

WORK AND LABOR:

Contracts of employment, see **MASTER AND SERVANT, 1.**

WRITINGS:

Written agreement to satisfy statute of frauds, see **FRAUDS, STATUTE OF.**

Written promise to pay note as removal of bar of statute, see **LIMITATION OF ACTIONS.**

Written instructions, see **TRIAL, 6.**

WRITS:

See **CERTIORARI; MANDAMUS; PROCESS; PROHIBITION; REPLEVIN.**

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